Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

OCTOBER TERM, 1993

PAMELA SMART,
Petitioner,

v.

STATE OF NEW HAMPSHIRE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW HAMPSHIRE SUPREME COURT.

Petition for Writ of Certiorari.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the New Hampshire Supreme Court erred in ruling that failure to sequester the Petitioner's jury in light of the extensive prejudicial publicity did not violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

2. Whether the New Hampshire Supreme Court erred in ruling that failing to change the venue of Petitioner's trial in light of the extensive local prejudicial publicity surrounding the case did not violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

3. Whether the New Hampshire Supreme Court erred in ruling that failing to postpone the Petitioner's trial, until such time as the extensive prejudicial publicity surrounding the case dissipated, did not violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

4. Whether the New Hampshire Supreme Court erred in ruling that secret interceptions of Petitioner's private conversations, where neither party validly consented to the interceptions, did not violate the Fourth Amendment to the United States Constitution?

5. Whether the New Hampshire Supreme Court erred in ruling that secret interceptions of interrogations of Petitioner which occurred after the Petitioner was represented by counsel and the State of New Hampshire was placed on notice that the Petitioner was represented by counsel, did not violate Petitioner's right to counsel pursuant to the Sixth Amendment of the United States Constitution?

6. Whether the New Hampshire Supreme Court erred in ruling that secret interceptions of interrogations of Petitioner by an agent of the State of New Hampshire, which occurred after the Petitioner was represented by counsel and the State of New Hampshire was placed on notice that the Petitioner was represented by counsel, did not violate the Rules of Professional Conduct?

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Petition for Writ of Certiorari.

Petitioner, Pamela Smart, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the New Hampshire Supreme Court entered on February 26, 1993 and April 29, 1993.

OPINIONS BELOW

The Opinion of the New Hampshire Supreme Court in *State of New Hampshire* v. *Pamela Smart*, has not yet been published and is attached hereto in the Appendix A to the Petition for Writ of Certiorari (A1).[1] The Order of the New Hampshire Supreme

[1] Hereinafter, references to the Appendix for Writ of Certiorari will be made in the following manner: (A page number).

Court on the Motion For Rehearing has not yet been published in official reports. A copy of the Order is attached hereto in the Appendix A to the Petition for Writ of Certiorari (A38).

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(a) to review final judgments by the highest court of a State.

STATUTES INVOLVED

The following statutes are involved: U.S. Const. amend. IV, V, VI and XIV; and American Bar Association Model Code of Professional Responsibility Disciplinary Rule 7-104(A)(1); American Bar Association Model Rules of Professional Conduct Rule 4.2; New Hampshire Rules of Professional Conduct 4.2; New Hampshire R.S.A. 570-A.

PROCEEDINGS BELOW

On August 1, 1990, Petitioner was arrested in connection with the murder of her husband and was held without bail. She has remained in custody ever since. On August 14, 1990, Petitioner was indicted by the Rockingham County Grand Jury for conspiracy to commit murder; accomplice to first degree murder; and, tampering with a witness.

Prior to trial, Petitioner filed three Motions to Change Venue and a Motion to Suppress Petitioner's Statements, all of which were denied. Petitioner subsequently filed a Motion to Reconsider Venue and a Motion to Sequester the Jury and these were likewise denied.

On the first day of jury deliberation the Petitioner renewed her Motion to Sequester the Jury, which was again denied, but on the second night of jury deliberation the trial court belatedly sequestered the jurors. The following morning the jury returned guilty verdicts on all three counts.

Petitioner timely filed her appeal with the New Hampshire Supreme Court and on February 26, 1993 the appeal was

denied. Petitioner timely filed a Motion for Reconsideration which was denied on April 29, 1993.

The Petitioner is in the custody of the State of New Hampshire and is confined for the rest of her life without the possibility of parole in the New York State Prison at Bedford Hills, New York.

STATEMENT OF THE CASE

The facts surrounding this case are quite extensive and a detailed summary is not possible. Accordingly, only the facts necessary to an understanding of the issues in this petition will be presented.

Shortly after 10 P.M. on May 1, 1990, Petitioner, the director of media services for a school district that included Winnacunnet High School in Hampton, New Hampshire, arrived home from a school committee meeting and discovered her husband, Gregory, lying dead in a pool of blood in the front hall of their home in Derry, New Hampshire.

Knowing that Cecilia Pierce, a sixteen year old, unemancipated minor was Petitioner's student intern, the Derry Police Department and the Assistant Attorneys General, in May of 1990, began a systematic campaign to frighten Pierce into becoming their secret agent. (T. Vol. XV, 1185-86; XVI 1343; T. Motion to Suppress Vol. I, 204-05).

On June 10, 1990, the parents of Vance Lattime turned over to the Seabrook Police Department a .38 caliber handgun, and at that time the police learned that possibly three (3) juveniles and one (1) adult may have been involved in the murder of Gregory Smart. (T. Vol. X, 390-393; 399-400). The police interviewed Raymond Fowler, an alleged accomplice in the murder, on the same day. (T. Vol. XV, 1180). On June 11, 1990, Captain Jackson of the Derry Police Department (Captain Jackson) again contacted Pierce; this time clearly threatening her and her mother with indictment for hindering either the investigation or evidence relating to the murder of Gregory Smart. (T. Vol. XV, 1181, 1186, 1189-1190; XVI, 1356).

The same day, after a ballistics report indicated that the gun turned over to the police was the same one used to murder Gregory Smart, police arrested the three (3) juvenile suspects, William Flynn (Flynn), Vance Lattime (Lattime), and Patrick Randall (Randall) in Seabrook. (T. Vol. XV, 1184-1185). The media seized upon these arrests and some of the headlines read: "WIFE MADE MUSIC VIDEO WITH TEEN SUSPECT: INVESTIGATORS EXPECT FOURTH ARREST" and "SMART'S WIFE KNEW ONE OF THE MURDER SUSPECTS."

Without once being warned of her "Miranda" rights, without the benefit of counsel, with only one consultation with her mother in the presence of the Derry Police, and without any grant of immunity, Pierce admitted to being an Accomplice to First Degree Murder. Thereafter, Pierce began to secretly tape record interrogations which she conducted of Petitioner, at the instruction of the Derry Police. (T. Vol. XV, 1188-91, 1197-1203; SVI, 1362; T. Motion to Suppress Vol. I, 10, 12-13, 197; Vol. II, 245-46).

On June 22, 1990, Petitioner retained the services of Attorneys Paul Twomey and Mark Sisti (Twomey & Sisti). The attorneys immediately advised the Attorney General of their representation and requested all communication with Petitioner be conducted through them. Not content with the representation of counsel, the Attorney General insisted on a letter signed by the Petitioner and on the same day, a handwritten letter signed by Petitioner was conveyed by Twomey & Sisti to the Office of the Attorney General. These letters placed the Office of the Attorney General on notice that Petitioner was represented by counsel and that she did not want to be contacted by any agent of the State without her counsel being present. (App. to Brief filed in N.H. Supreme Court at 6-8).

On July 11, 1990, the Derry Police made arrangements with the Attorney General to place a body wire on Pierce to secretly intercept her interrogations of Petitioner. (T. Motion to Suppress Vol. II, 256-257). On July 12, 1990, at the direction of the Derry Police, Pierce proceeded to Petitioner's office on Alumni Drive across from Winnacunnet High School in

Hampton, New Hampshire to question Petitioner about the murder. (T. Motion to Suppress Vol. I, 184). Before going, the police again instructed Pierce to interrogate Petitioner about the murder. (T. Vol. XV, 1220). Following her interrogation of Petitioner, Pierce left and drove immediately to the Seabrook Police Station. (T. Motion to Suppress Vol. I, 46). The same night, after her debriefing and following removal of the body wire, the Derry Police asked Pierce if she would wear a body wire on the following day. (T. Motion to Suppress Vol. I, 188-189). On July 12, 1990, the Derry Police requested and received authorization to place a body wire on Pierce to secretly intercept her interrogation of Petitioner. (T. Motion to Suppress Vol. II, 262). Lyons authorized the interception on July 13, 1990. (T. Motion to Suppress Vol. II, 262-263).

On July 13, 1990, Pierce purportedly consented to another body wire and did so at the Seabrook Police Station in the presence of Derry Police Officers; however, again, her mother was not present, she was not represented by counsel and she was not advised of her "Miranda" warnings. (T. Vol. XV, 1228). The second body wire intercepted an interrogation in Pierce's mother's car in the parking lot outside of Petitioner's office. (T. Vol. XV, 1229; XVI, 1368). Again, the police directed Pierce to interrogate Petitioner about the murder. (T. Vol. XV, 1229).

Prior to August 1, 1990, the police again contacted Pierce to ask her if she would agree to a sixth secret interception of her interrogation of Petitioner. (T. Motion to Suppress Vol. I, 191).

On August 1, 1990, Pierce, at the direction of the State, again placed a telephone call either to Petitioner's office or her home. (T. Motion to Suppress Vol. I, 191).

On August 1, 1990, Petitioner was arrested at her place of employment. (T. Vol. XV, 1245).

The defendant's subsequent trial was the most publicized case in New Hampshire's judicial history. (A10). There were approximately 1200 news stories printed about her case, locally and nationally, and the radio and television coverage was commensurate. (A43; 47). News articles began to appear when Gregory Smart was found by Petitioner, murdered in their

home. (A43; 47). More articles appeared when Petitioner was arrested and as her trial neared, the frequency and sensationalism of the articles increased. (A43; 47).

Of the nearly 1200 newspaper accounts, more than sixty (60%) percent appeared in local publications, and ninety-five (95%) percent appeared after Petitioner was arrested. (A43; 47).

Contrary to the usual practice and procedure of the Rockingham County Superior Court, on January 9, 1991, the notice to the venire advised them they were being specifically called upon to serve on a particular case, *State* v. *Pamela Smart*, thus inescapably heightening their interest in the case. (App. to Brief filed in N.H. Supreme Court at 9). A delay in the trial caused another notice to be sent to the venire and again they were reminded they were being called upon to serve as jurors in the case of *State* v. *Pamela Smart*. (App. to Brief filed in N.H. Supreme Court at 10). If the highly unusual notices served no other purpose, they focused the attention of the venire on the pervasive media accounts on every corner news stand, radio station and television channel. The notices contained no admonition to avoid media accounts of the pending case.

It was not just the print media that kept the defendant in the public's eye. Local television station WMUR-TV, Channel 9, took special interest in the case and its investigative reporter, William Spencer, became a celebrity and "instant expert" on the progress of the case. In addition to daily news coverage and live television coverage of each day at the trial, Spencer appeared on the nationally syndicated television talk show "Geraldo" and pronounced 'REAL EVIDENCE (AGAINST SMART) IS ASTRONOMICAL; ONCE THE JUDGE HEARD THE TAPES, HE HELD PAME WITHOUT BAIL;" and, "EVIDENCE IS OVERWHELMING." Not content with the havoc he had wreaked on the defendant's right to a fair trial, Spencer again appeared on WMUR-TV on a program entitled "ANATOMY OF A MURDER." On this program, aired just several days before jury selection, Spencer made sure the potential jurors learned that Petitioner was indicted on three (3) new felony charges, including an attempt to murder a witness. None of this evidence was admitted at trial. On the

same program, Pierce, a principal witness, appeared and made the following statements: "PAME AND FLYNN WERE HAVING AN AFFAIR AND PAME SPOKE ALMOST DAILY OF KILLING HER HUSBAND;" "SHE TOLD HIM THEY WERE GOING TO SET IT UP LIKE A BURGLARY;" "SHE TOLD HIM TO GET A SILENCER WHICH I DON'T KNOW IF THEY DID;" "SHE SAID GREG'S LIFE INSURANCE WAS PRETTY GOOD SINCE GREG WAS AN INSURANCE MAN."

It was not only the local television channel, WMUR-TV, that devoted so much time to the trial; every major Boston station which is seen in New Hampshire covered the case, as did the national networks, ABC, CBS, NBC, CNN and others.

The jury venire were greeted on their very first day by an army of media correspondents who had surrounded the courthouse with vans, bristling with satellite antennae. The potential jurors were photographed entering the courtroom and besieged by reporters on their way out. Even the jurors had obtained celebrity status. What was less obvious, however, was the newspaper stand in the courthouse lobby, newspapers that were carried into the jury pool room by some members of the venire on the first day, and the effect the massive amount of negative publicity had on the venire. On the first day they reported, the members of the venire actively discussed the case among themselves and one member, reflecting on these discussions, was of the opinion that the consensus of the venire was that Petitioner was guilty. Another recalls the "circus"-like atmosphere and one of the women in the venire saying, "SHE'S GUILTY! LET'S GET OUT OF HERE." These comments were made in the presence of those who would eventually sit on the petit jury.

The media influence did not stop at the courthouse steps; the press was invited into the courtroom and special accommodations were made for its convenience: parking spaces were assigned; cables were laid; a special room was built right beside the room where Petitioner was confined when not actually in the courtroom; and more than half of the seats in the courtroom

were assigned to the media, making it necessary for temporary seating to be placed inside the bar enclosure directly across from the jury box. Of course, these ringside seats were for the members of the judge's family and other VIP's, including other members of the judiciary who came to gawk at the spectacle.

It was not merely the overpowering physical presence of the media that infected the proceedings but also the conduct of the reporters during the trial that gave rise to the impression of being present at a "Roman circus." During the testimony of Petitioner and Cecilia Pierce, the clicking of cameras became so bothersome and distracting that the judge had to stop the proceedings and address the media by stating, "I DON'T KNOW HOW MANY PICTURES THE PRESS NEEDS OF ONE INDIVIDUAL WITHIN A TEN MINUTE SPAN." (T. Vol. XVI, 1297). The trial court's admonition, in substance, had to be repeated several other times. (T. Vol XV, 1289; XVII, 1574; XVIII, 1728). The photographers would often times stand in order to get their pictures and, of course, this would cause a commotion. On March 12, during a luncheon recess, twenty to thirty members of the press were permitted by the trial court to enter the bar enclosure where they were free to photograph exhibits and could have scrutinized notes and papers left out by defense counsel. (T. Vol. XIII, 894-895).

Every day when Petitioner was escorted to and from the courtroom or would try to use the restroom, the photographers would rush after her, lining the walls and forming a gauntlet through which she had to pass; the lights would go on, the cameras would whir and click. One day during a break in the trial when Petitioner was proceeding to the restroom, the crush of the photographers was so great that one of them was pushed off his feet but he continued taking pictures from his position on the floor.

The media's impact upon these proceedings was overwhelming: everyone was aware of its dominating presence. One juror, reflecting upon the impact of the media on the jurors stated: "I FELT LIKE A BUG IN A GLASS JAR TODAY"; I'VE

NEVER SEEN THAT MUCH MEDIA EVER AND THEY WERE ALL THERE WITH THEIR CAMERAS ON US . . ."; "THE PEOPLE WERE EVEN STARING THEIR CAMERAS AT THE GLASS TRYING TO LOOK THROUGH THE TINTED GLASS OF THE BUS WITH THEIR CAMERAS. I WAS SICKENED. ACTUALLY, IT WAS A PAIN IN THE ASS . . ."; "I HAD NO IDEA IT WAS GOING TO BE THIS BIG OF A CIRCUS, THIS MUCH MEDIA ATTENTION . . ."; "I MEAN, EVERYBODY I KNOW HAS SAID, 'GEE, I SAW YOU ON TV TODAY' "; "I'M FEELING A LOT OF STRESS, WAY MORE THAN I THOUGHT. I THINK EVERYBODY FEELS THAT WAY"; "THE DEFENSE'S NEXT WITNESS WAS PAME SMART. AND ABOUT TEN BILLION CAMERAS, TCH, TCH, TCH; GOING OFF AND EVERYBODY IS TAKING BILLIONS OF PICTURES"; and "AND I THINK THE CIRCUS OF THE MEDIA, YOU KNOW, WAS RIDICULOUS. I MEAN, IT LOOKED LIKE, YOU KNOW, GROUND ZERO, YOU KNOW."

The trial was conducted under this white heat glare of media scrutiny before a nonsequestered jury and the evidence was broadcast daily, live and in color.

The evidence showed that the Petitioner had become sexually involved with a fifteen year old high school student, William Flynn. The juveniles, including Cecilia Pierce, testified that Flynn and his friends planned and executed the murder of Gregory Smart at the instigation and with the connivance of the Petitioner.

The surreptitious tape recordings between Petitioner and Pierce of July 12, and 13, were admitted into evidence and the Petitioner could be heard telling Pierce "that the boys had carried out the murder to look like a burglary as she had planned" and that "as between a sixteen year old 'in the slammer facing the rest of his life' and herself 'with a professional reputation' and a course" that she taught, her denial would be believed. (A5).

The Petitioner took the witness stand in her own defense and while she admitted to having an affair with Flynn, she

denied having anything to do with the murder of her husband. Petitioner explained her tape recorded conversations with Pierce as her attempts to find out what the police were doing to investigate the murder as they would not share their progress with her.

On March 20, 1991, presentation of evidence was completed in the trial of Petitioner and her case was sent to the jury. (T. Vol. XIX, 1967). The media barrage continued unabated, prompting defense counsel to renew their motion to sequester. (T. Vol. XIX, 2000). Despite admitting "the press is out of control", the trial court denied the Petitioner's urgent request. (T. Vol. XIX, 2009).

That evening, after the first day of jury deliberation, the jurors were permitted to return to their homes and carry on their routine activities such as food shopping, socializing and caring for the daily needs of their households. (T. Vol. XIX, 2007-2009). That evening's headlines included the following: "READER'S VERDICT: GUILTY AS CHARGED"; "A TANGLED WEB OF SEX, LIES & MURDER"; "EXPERTS: TESTIMONY AN ACT OF DESPERATION"; and "MAIDEN OF METAL ENJOYS HER COURTHOUSE TANGO." Headlines the next morning, March 21, 1991, included the following: "GREGORY SMART'S PARENTS SAY THEY'RE CONVINCED OF DAUGHTER'S GUILT"; and "GREG'S PARENTS PRAY FOR PAM'S CONVICTION." (A59).

The next morning, jurors returned from their homes to the Rockingham Superior Court and deliberated for the entire day, at which time the trial court finally ordered them to be sequestered. (A22). Before sequestering the jurors, the trial court neither admonished them to disregard the rampant coverage of the trial, nor did it make any inquiry to determine if the jurors had been exposed to any of the virulent media coverage. (T. Vol. XX, 2011-2025, T. Vol. XXI, 2026-2049). Following a single night of sequestration, the jury returned a verdict of guilty on all three counts.

As a result of the foregoing trial and proceedings, Petitioner is in the custody of the State of New Hampshire and is confined

for the rest of her life, without possibility of parole, in the New York State Prison at Bedford Hills, New York.

REASONS FOR GRANTING THE WRIT

Petitioner contends there are compelling reasons to grant her petition for writ of certiorari: First, the explosive growth of media attention to the nation's trial courts, as evidenced by Petitioner's trial, has increased the tensions between the competing demands of a free press and the right of every citizen to a fair trial by an impartial jury. The trial courts need guidance in dealing with this delicate balancing act, otherwise the system will be overwhelmed and the result will be, as in Petitioner's case, an unfair conviction. Secondly, law enforcement authorities must understand the limits of their reach and must not be permitted to undermine the protections afforded every citizen by the Constitution.

A. The New Hampshire Supreme Court Erred in Ruling That Failure to Sequester the Petitioner's Jury Did Not Violate Her Rights Pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The New Hampshire Supreme Court agreed that the publicity surrounding the Petitioner's trial was enormous and unprecedented in the history of New Hampshire jurisprudence. (A10). The media saturated every stage of Petitioner's trial and on the very day her case was sent to the jury for deliberation, the trial court admitted that "the press is out of control". (T. Vol. XIX, 2009). Despite counsel's motion for sequestration the trial court erroneously permitted the jurors to return to their homes that evening and belatedly sequestered them the following day.

The New Hampshire Supreme Court erred when it ruled that failure to sequester the jury in the circumstance of Petitioner's trial did not amount to an abuse of discretion. (A23). Once the trial court observed that the "press was out

of control" it was bound by an immediate and affirmative duty to take whatever steps were necessary to guarantee a fair trial. *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). This Court has stated:

> To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial (and trial) publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.

Gannett Co., Inc. v. *DePasquale*, 443 U.S. 368, 378 (1979).

Notwithstanding the minor inconveniences that attend every jury sequestration and which should have been anticipated to minimize their impact, the jurors were allowed to go to their homes and were potentially exposed to extensive news articles with inflammatory headlines such as those set out in the Statement of the Case and in the Appendix to the Petition (A43; 47).

The trial court's error in failing to sequester the jury was compounded when it failed to inquire of the jurors after their first night of deliberations whether or not they had been exposed to any of the overnight's barrage of media coverage.

The New Hampshire Supreme Court tried to shift the responsibility for the conduct of the Petitioner's trial to her counsel by holding that it was the Petitioner's duty to make a specific showing that the jurors were exposed to the inflammatory publicity. (A23) Clearly, this is an impossible burden to place on trial counsel as it have would required a *voir dire* of individual, deliberating jurors. Even if Petitioner's counsel could have engaged in such unorthodox tactics it would have been to no avail, for as Justice Frankfurter observed in *Irvin* v. *Dowd*, 366 U.S. 717 (1961): "Flamboyant pretrial publicity casts sufficient doubt on the impartiality of the jury to vitiate a conviction, even in the face of statements by all the jurors that they were not subject to its influence."

At the very heart of the New Hampshire Supreme Court's opinion lies a mischaracterization of the nature of the publicity surrounding the Petitioner's trial. The publicity concerning Petitioner's trial was not only overwhelming in quantity, but it was exactly of that nature certain to cause prejudice. (A43; 47).

The New Hampshire Supreme Court incorrectly opined that Petitioner pointed to only one item as potentially prejudicial, the outrageous television program titled, "Anatomy of a Murder." On the contrary, from among the avalanche of newspaper reports, the defendant specifically highlighted several inflammatory newspaper headlines occurring in close proximity to the date of her trial. For example: "Smart Wanted Key Witness Killed, Police Say" (*The Eagle Tribune*, 1/5/91, Front Page); "Smart Indicted For Trying To Have Witness Killed" (*The Union Leader*, 1/5/91, Front Page); "Slay Victim's Kin Angry At Widow Suspect" (*Boston Herald*, 2/4/91); "Smart Painted As Killer" *Eagle Tribune*, 3/5/91, Front Page); and "Pamela Smart: Evil Schemer Or Innocent Victim?" *Foster's Daily Democrat*, 3/6/91, Front Page).

The television program, "Anatomy of a Murder," was aired on the major local New Hampshire television channel just several days before jury selection, and it was every bit as prejudicial as the taped confessions referred to in *Rideau* v. *Louisiana*, 373 U.S. 723 (1963). (See Statement of the Case.)

The New Hampshire Supreme Court relied on more than thirty (30) hours of videotape of the Petitioner's trial as the best evidence of the trial atmosphere and its conclusion that the Petitioner's trial did not remotely resemble the conditions in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). It should be pointed out that the focus of the camera was exclusively upon the witnesses and the judge, and neither the camera nor the directional microphone depicted what the jurors' actually heard, saw or felt during the conduct of the trial. Juror Karen Sicard was acutely aware of the stifling effect of the media's presence throughout the trial. (See Statement of the Case.)

The New Hampshire Supreme Court's mischaracterization of the trial record with respect to the audible snapping of shutters of still cameras, overlooks the fact that not only were the shutterbugs at work during Pierce's and Petitioner's testimony, but also that of Flynn and during the admission into evidence of the gun used in the commission of the crime. Contrary to the New Hampshire Supreme Court's opinion, the record clearly shows that the press was permitted within the bar enclosure by the trial court and were thus in a position to have viewed defense counsel's notes. (T. Vol. XIII, 894-895). When called to the attention of the trial court, it acknowledged the merit of the objection and promised to notify counsel in advance of any further intrusions by the press into the bar enclosure. Similarly, the New Hampshire Supreme Court totally ignored the fact that the public was allowed inside the bar enclosure throughout the trial and occupied seats directly across from the jury. The practice of permitting the press and the public inside the bar enclosure is specifically prohibited by *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

The New Hampshire Supreme Court failed to address the fact that immediately outside of the courtroom, whenever the Petitioner had to use the rest room, the press would line the corridors and require her to run a gauntlet of cameras. While the jury may have been insulated from this egregious conduct, the Petitioner was not; the Petitioner was the defendant on trial, not the jury, and she was entitled to her day in court, "not in a stadium or city or nationwide arena." *Estes* v. *Texas*, 381 U.S. 532, 549 (1965).

Clearly, considering all of the circumstances attendant to Petitioner's trial, failure to sequester the jurors, at least on the first day of deliberation, constituted error. The New Hampshire Supreme Court's decision holding otherwise is in conflict with *Sheppard* v. *Maxwell*, other opinions of this Court, and the guarantees of the United States Constitution.

B. THE NEW HAMPSHIRE SUPREME COURT ERRED IN RULING THAT FAILING TO CHANGE THE VENUE OF PETITIONER'S TRIAL IN LIGHT OF THE EXTENSIVE LOCAL PREJUDICIAL PUBLICITY SURROUNDING THE CASE DID NOT VIOLATE THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On three occasions prior to trial the Petitioner filed motions to change the venue of the trial, all of which were denied. Yet, the New Hampshire Supreme Court noted that Petitioner did not avail herself of another motion to change venue after the jury had been *voir dired*. This opinion again demonstrates a shocking lack of comprehension of trial dynamics: to suggest that a motion to change venue would be appropriate after a jury has been empaneled is ridiculous on it's face. The idea behind the motion for a change in venue is not to try to bring an empaneled jury to some other jurisdiction, rather it is an attempt, properly made before a jury is empaneled, to try to find the most indifferent venire possible under the circumstances.

Where news accounts in an area where the trial is to take place may have created a situation in which it is unlikely that the accused can obtain a fair trial, a judge should transfer a trial to another area less touched by the publicity. *See generally*, *Rideau* v. *Louisiana*, 373 U.S. 723 (1963).

The simple, relatively inexpensive remedy of changing venue assures that the defendant who is on trial for a specific crime is provided "his day in court not in a stadium or city or nationwide arena." *Estes* v. *Texas*, 381 U.S. 532, 549 (1965). Of great concern to the Court in that case was the potential impact of television on the jurors. This Court stated that:

> From the moment the trial judge announces that a case will be televised, it becomes a *cause celebre*. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the public press and the accused

> is highly publicized along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts and thus increases a chance of prejudice that is present in every criminal case.

Estes, 381 U.S. at 545.

Prejudice should be presumed when pretrial publicity has saturated the community where the trial was held. O'Connell, J., *Pretrial Publicity, Change of Venue, Public Opinion Polls — Theory of Procedural Justice*, 65 U. Det. L. Rev. 170 (Winter, 1988). Such presumed prejudice has been found in cases where "prejudicial publicity so poisoned the proceedings that it was impossible for the accused to receive a fair trial by an impartial jury. The clearest paradigms . . . [are cases where] the press saturated the community with sensationalized accounts of the crime and court proceedings and was permitted to overrun the courtroom. . . ." *United States* v. *Porcaro*, 648 F.2d 753, 758 (1981) (quoting *United States* v. *Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980)).

Taking into consideration the workings of the human mind and of human nature, "there is great probability that the average American, who has formed an opinion, may not be able to totally disregard it in reaching a verdict, although he may take oath that he can and will do so." Andrews, *The Sawtelle Doctrine: A Valid Test?*, New Hampshire Bar Journal 19, 28-29 (October, 1961). This Court has held that in a case where there is adverse pretrial publicity, a presumption of prejudice in a community is created and thus a juror's claim that he can be impartial should not be believed. *Patton* v. *Yount*, 467 U.S. 1025, 1031 (1984). In addition, this Court in *Irvin* v. *Dowd*, held "flamboyant pretrial publicity casts sufficient doubt on the impartiality of the jury to vitiate a conviction even in the face of statements by all the jurors that they were not subject to its influence." *Irvin* v. *Dowd*, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring). "Almost any juror, when detected in such misconduct and arraigned for it, will disclaim the influence upon his own mind of what

he uttered in violation of his duty. This is human nature." *Pool* v. *C., B. & Q. R. Co.*, 6 F. 844, 851 (D. Iowa 1881).

The problem of prejudicial publicity has been exacerbated by the "speed of communications and the pervasiveness of the modern news media." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 548 (1976). Studies have shown that today more than fifty-seven (57%) percent of television owners have cable and seventy (70%) percent have VCR's. Cate, F. & Minnow, N, *Who Is an Impartial Juror in the Age of the Mass Media?*, 40 Am. U. L. Rev. 631, 635 (1991) [hereinafter Impartial Juror]. In addition, the results of the studies have shown that the average hours of television use by a household has risen to seven (7) hours per day and the average radio use is almost three (3) hours per day. In addition, more than sixty-four (64%) percent of American households read newspapers. Impartial Juror at 635. Thus, the average household is exposed daily to various types of news accounts from the television, radio and newspapers.

Empirical literature has indicated that various forms of prejudicial publicity have an effect on public opinion and juror sentiment. *See* Carroll, Kerr, Alfini, Weaver, MacCoun & Feldman, *Free Press and Fair Trial: The Role of Behavioral Research*, 10 *Law and Hum. Behav.* 187, 189-90 (1986). In addition, a number of empirical studies suggest that "some jurors are affected by adverse pretrial publicity." *See* Kramer, Kerr & Carroll, *Pretrial Publicity, Judicial Remedies & Jury Bias*, 14 *Law and Hum. Behav.* 409, 431-34 (1990).

This Court in *Irvin*, stated that there is "no doubt that each juror was sincere when he said that he would be fair and impartial to the petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin* v. *Dowd*, 366 U.S. at 728. As one of the jurors interviewed in the *Irvin* case stated, "*you can't forget what you hear and see.*" *Irvin*, 366 U.S. at 728 (emphasis added). This statement can be supported by the results of studies that show that the jurors exposed to highly prejudicial publicity were significantly more likely to convict (53 percent) than those

that were not exposed to such publicity (23 percent). *See*, Sue, Smith & Pedroza, *Authoritarianism, Pretrial Publicity and Awareness of Bias and Simulated Jurors*, 37 Psychological Rep. 1299, 1300 (1975).

According to this Court in *Rideau*, the change of venue is constitutionally sufficient to ensure a trial by an impartial jury as guaranteed by the United States Constitution. In addition, this Court has stated that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should . . . transfer it to another county not so permeated with publicity." *Sheppard*, 384 U.S. at 363.

This Court has further held in *Rideau* that "it [is] denial of due process of law to refuse a request for change of venue, after the people . . . have been exposed repeatedly and in depth [to the prejudicial pretrial publicity]." *Rideau*, 373 U.S. at 726.

The attempt to ameliorate the media hysteria by a jury *voir dire*, in this case, was inadequate to protect the Petitioner and the trial court erred when it denied the Petitioner's urgently pleaded motions for change of venue. The New Hampshire Supreme Court's decision is contrary to this Court's decisions in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), *Murphy* v. *Florida*, 421 U.S. 794 (1975), other decisions of this Court and the guarantees of the United States Constitution.

C. The New Hampshire Supreme Court Erred in Ruling That Failing to Postpone the Petitioner's Trial Until Such Time as the Extensive Prejudicial Publicity Surrounding the Case Dissipated Did Not Violate The Fifth, Sixth and Fourteenth Amendments to The United States Constitution.

The New Hampshire Supreme Court persists in the same fatally erroneous analysis of this very straightforward issue; namely, it engaged in a mechanical, mathematical computation of whether the number of straightforward news articles was greater than the more sensational news articles and concluded that the numbers favored the straightforward articles; therefore,

there was no inherent prejudice existing in the trial of Petitioner's case; therefore, it was Petitioner's burden to insist on a continuance.

This rather tortured syllogism ignores the ancient reality that only a few drops of hemlock can silence one of the greatest minds of Western Civilization. It furthermore blinds the court to the other realities surrounding the Petitioner's trial. (See Statement of the Case.)

The New Hampshire Supreme Court demonstrated a total disregard of the potential impact the media would have on the jurors.

> Where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity. The measures a judge takes, or fails to take to mitigate the effects of pretrial publicity . . . may well determine whether the defendant received a fair trial consistent with the requirements of due process.

Nebraska Press Association v. *Stewart*, 427 U.S. 539, 553 (1976) (citing *Sheppard* v. *Maxwell*, 384 U.S. 333, 362-63 (1966)).

The Petitioner had requested a two week continuance and that was granted by the trial court. According to the trial court, "it did not receive any additional motions to continue, and indeed proceeded after the short continuance on the insistence by the defendant of her right to speedy trial." (A14). The New Hampshire Supreme Court failed to recognize that the Petitioner was anxious for her trial to commence because she had been held without bail in the Goffstown Prison for six months prior to trial. When the trial court recognized that the media attention was continuing unabated it had an affirmative duty to provide the Petitioner with a fair trial even if that would necessitate that the trial of her case be postponed. *Delaney* v. *United States*, 199 F.2d 107, 115 (1st Cir. 1952). Her failure to move for a further continuance, did not relieve the trial court of this affirmative duty. "The ends of

justice served by the granting of a continuance outweigh the best interest of the public and the [defendant's] right to a speedy trial." *United States* v. *Perez-Casillas*, 593 F. Supp. 794, 808 (1984).

The decision of the New Hampshire Supreme Court is contrary to the decisions of this Court in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966) and *Nebraska Press Association* v. *Stewart*, 427 U.S. 539, 553 (1976), other decisions of this Court and the guarantees of the United States Constitution.

D. The New Hampshire Supreme Court Erred in Ruling That Secret Interceptions of Petitioner's Private Conversations, Where Neither Party Validly Consented to the Interception, Did Not Violate the Fourth Amendment to The United States Constitution.

The opinion of the New Hampshire Supreme Court, that the secretly recorded conversations between the Petitioner and Cecilia Pierce, an unemancipated minor, violated no recognizable constitutional rights of the Petitioner, is in direct conflict with the provisions of the Fourth Amendment and decisions of this Court.

It is clear that the New Hampshire Supreme Court, in the case at bar, upheld the constitutionality of the secretly recorded conversations of the Petitioner on the basis that a New Hampshire statute carves out a very narrow exception to the general constitutional prohibitions against warrantless searches and seizures. (A28). This exception, however, as set forth in New Hampshire R.S.A. 570-A, only applies when the consent of one party is considered to be valid; more specifically it implies that the consent be knowing, voluntary and intelligent.

The majority of jurisdictions have held that valid consent to a wire intercept, as in the case of a waiver of constitutional rights, must be voluntary and uncoerced. *See generally United States* v. *Kolodziej*, 706 F.2d 590 (5th Cir. 1983). To be an act of consent by an individual it must be "a consensual act of one who knew what he was doing and had a reasonable appreciation

of the nature and significance of his actions." *United States* v. *Marcello*, 508 F. Supp. 586 (1981) (quoting *United States* v. *Elrod*, 441 F.2d 353, 355 (5th Cir. 1971)). *See also United States* v. *Napier*, 451 F.2d 552 (5th Cir. 1971).

The court in *Kolodziej*, indicated "a situation of consent, of course, might well be different if the consensual cooperation had been secured by actual threats of a physical nature or prosecutorial action which had no realistic foundation." *Kolodziej*, 706 F.2d at 595. Consent is involuntary if it is based upon threats or promises of illegitimate action. *Kolodziej*, 706 F.2d at 594.

The New Hampshire Supreme Court's opinion affirms the trial court's finding that Pierce's consent was voluntary. (A28). The fact that Pierce, by her own admission, was an accomplice to first degree murder and was never advised by law enforcement authorities that this was her perilous situation, militates against a finding of valid consent. At no point during the interrogations by the Derry Police Department was Pierce given an opportunity to consult with counsel to discuss the peril surrounding her, nor was she ever promised immunity from prosecution, nor was she advised that by consenting to the surreptitious wire recording, she would be giving up her right against self-incrimination. Further, she was not given an opportunity to have a meaningful consultation with her mother outside the presence of the police.

The police failed to demonstrate that same degree of care and solicitude toward Pierce, that the trial court exercised when it denied Petitioner's Motion to Depose Pierce, even though the Attorney General had consented to the deposition. The New Hampshire Supreme Court, on the one hand, was satisfied by the trial court's conclusion that Pierce voluntarily consented to the tape recorded conversations with the Petitioner, yet, on the other hand, the New Hampshire Supreme Court ignored the fact that the trial court prohibited the taking of Pierce's deposition precisely because she was a minor.

The Fourth Amendment as set forth in *Katz* v. *United States*, 389 U.S. 347 (1967), provides protection to the Petitioner

against secret interception of her private conversations. That which an individual seeks to preserve as private, such as private conversation with friends, even in an area accessible to the public, may be constitutionally protected. *Katz*, 389 U.S. at 359. It is clear that the New Hampshire Supreme Court's decision in the instant case is in direct conflict with the provisions of the Fourth Amendment and decisions of the Supreme Court of the United States, such as *Katz* v. *United States*, and presents a question of substantial constitutional dimension which dictates the grant of a writ of certiorari.

E. The New Hampshire Supreme Court Erred in Ruling That Secret Interceptions of Petitioner's Interrogations, Which Occurred After the Petitioner Was Represented By Counsel and The State of New Hampshire Was Placed on Notice That the Petitioner Was Represented By Counsel, Did Not Violate Petitioner's Right to Counsel Pursuant to the Sixth Amendment of The United States Constitution

The opinion of the New Hampshire Supreme Court is contrary to the provisions of the Sixth Amendment's guarantee to have the assistance of counsel and is in conflict with decisions of this Court.

This Court has stated that "the Constitution defines only the 'minimum historic safeguards' which defendants must receive rather than the outer bounds of those we may afford them." *United States* v. *Hammad*, 846 F.2d 854, 859 (1988) (citing *McNabb* v. *United States*, 318 U.S. 332 (1943)). "The Constitution prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise." *United States* v. *Hammad*, 846 F.2d at 859.

The right to the assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution is "indispensable to the fair administration of our adversarial system of criminal justice." *Maine* v. *Moulton*, 474 U.S. 159, 168-69 (1985). *See also United States* v. *Morrison*, 449 U.S.

361 (1980). The Sixth Amendment imposes on states "an affirmative obligation to respect and preserve the accused's choice to seek [the] assistance [of counsel]." *Moulton*, 474 U.S. at 171. Prosecutors and police officers, agents for the state, have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the Sixth Amendment right to counsel. *Moulton*, 474 U.S. at 171.

The right to counsel, which embodies "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself," *Johnson* v. *Zerbst*, 304 U.S. 458, 462-63 (1938), provides certain safeguards for the other constitutional rights "deemed essential to the fair protection of a criminal proceeding." *Moulton*, 474 U.S. at 169.

This Court has held that the right to counsel attaches "where the results might settle the accused's fate and reduce the trial itself to a mere formality." *Moulton*, 474 U.S. at 170. The New Hampshire Supreme Court has denied the Petitioner her Sixth Amendment rights by ruling that her federal constitutional right to counsel was not infringed when law enforcement authorities surreptitiously recorded her interrogation by an agent of the State prior to the institution of criminal charges. (A29-30).

This Court has refused to set forth a bright line rule of when the Sixth Amendment right to counsel attaches. "[T]he assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Moulton*, 474 U.S. at 170. "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means *at least* that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . ." *Moulton*, 474 U.S. at 170 (citing *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977)). (emphasis added).

By recognizing that the Sixth Amendment guarantee attaches at least after the initiation of formal charges, this Court by implication, allows that such rights may attach at an earlier stage. *Moulton*, 474 U.S. at 170. The State has an affirmative obligation not to act in a manner that circumvents the protections accorded to individuals who invoke this right. The determination of whether particular actions by state agents violates one's right to the assistance of counsel must be made in light of this obligation. *Moulton*, 474 U.S. at 170.

Indictment or formal charges cannot be the bench mark to determine when the Sixth Amendment constitutional right attaches. It has been recognized that the timing of an indictment's return (or formal charges), lies substantially within the control of the prosecutor and can be manipulated to avoid Sixth Amendment encumbrances. *See generally United States* v. *Hammad*, 846 F.2d 854 (2d Cir. 1988). The State of New Hampshire's insistence that the Sixth Amendment's right to counsel does not attach until formal charges have been initiated by the prosecutor is squarely at odds with the New York Supreme Court's decision in *People* v. *Skinner*, 436 N.Y.S. 2d 207 (N.Y. Ct. App. 1980), and unduly restricts the holding in *Maine* v. *Moulton*, 474 U.S. 159 (1985).

On June 11, 1990, the State of New Hampshire arrested and charged the three juvenile suspects, with the murder of Gregory Smart. The fact that the Petitioner, the fourth suspect, who was the adult, was not arrested at this time was no mere coincidence. The State clearly manipulated the timing of formal charges, while they gathered evidence from the Petitioner herself, in order to reduce the trial against her to a "mere formality."

At least as early as June 22, 1990, the State of New Hampshire was aware that the Petitioner was represented by counsel in connection with this case and that her attorneys, Paul Twomey and Mark Sisti, had instructed the State of New Hampshire not to question the Petitioner in their absence. (App. to Brief filed in N.H. Supreme Court at 6-7). Not willing to accept counsels' representations, the New Hampshire Attorney General insisted that the Petitioner make this request personally. She complied. (App. to Brief filed in N.H. Supreme

Court at 8). By this time it had become crystal clear, to all parties, that the Petitioner had become the focus of the investigation into the murder of Gregory Smart and that she was represented by counsel.

After the June 22, 1990 notification, the State knowingly circumvented the Petitioner's right to have counsel present at any confrontations between the Petitioner and the State's agent, Cecilia Pierce. Between July 12 and August 1, the date of the arrest of Petitioner, the Derry Police on three separate occasions placed a body wire on Pierce, who had become the State's "alter ego." The State coerced this unemancipated, unrepresented child, Pierce, instructed her to interrogate Petitioner about the murder and secretly taped the contrived conversations between Pierce and the Petitioner. This ruse by the State constituted nothing more than an effort to do indirectly that which it knew it could not do directly; interrogate the Petitioner without the assistance of counsel. *See Moulton*, 474 U.S. at 170.

The spirit of this Court's holding in *Maine* v. *Moulton* requires a prosecutor to refrain from interrogating, directly or indirectly, an individual who has retained counsel specifically for representation in conjunction with the criminal matter in which she is held suspect, and the State has knowledge of that fact. The New Hampshire Supreme Court's decision in this case conflicts with the provisions of the Sixth Amendment and presents this Court with a question of substantial constitutional dimensions which dictates the grant of a writ of certiorari.

F. The New Hampshire Supreme Court Erred in Ruling That Secret Interceptions of Petitioner's Interrogations By An Agent of the State of New Hampshire, Which Occurred After the Petitioner Was Represented By Counsel and the State of New Hampshire Was Placed on Notice That the Petitioner Was Represented by Counsel, Did Not Violate the Rules of Professional Conduct.

By exonerating the New Hampshire Attorney General's Office of any ethical violations stemming from their secret inter-

ception of several of Petitioner's interrogations, the New Hampshire Supreme Court has expressed an opinion which is contrary to federal law and which is in conflict with the decision of a United States Circuit Court of Appeals.

Most federal and state jurisdictions have adopted, in one form or another, the American Bar Association Model Code of Professional Responsibility (ABA Code), or its successor, the American Bar Association Model Rules of Professional Conduct (ABA Rules). Furthermore, federal courts, pursuant to their general supervisory authority over members of the Bar, are charged with enforcing professional responsibility standards upon attorneys. Chief Justice Burger, writing for the *Snyder* Court wrote "Federal Courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of *federal law*." *In Re Snyder*, 472 U.S. 634, 645 n.6 (1985) (citing *Hertz* v. *United States*, 18 F.2d 52, 54-55 (C.A. 1927)) (emphasis added). *See also In Re American Airlines*, 972 F.2d 605, 610 (5th Cir. 1992). The ABA Code prohibits an attorney from contacting a party who is represented by counsel. (ABA Model Code of Professional Responsibility DR 7-104 (A)(1) as set forth in Addendum). In those jurisdictions where the rule has been adopted, it has been held to apply to criminal as well as civil cases. *See e.g. United States* v. *Hammad*, 846 F.2d 854, 858 (2d Cir. 1988); *United States* v. *Jamil*, 707 F.2d 638, 645 (2d Cir. 1983); *United States* v. *Ryans*, 903 F.2d 731, 735 (10th Cir. 1990); *United States* v. *Thomas*, 474 F.2d 110, 111 (10th Cir. 1973).

However, there is a split among the several circuits over the applicability of the rule to pre-indictment, non-custodial criminal interrogations. The Second Circuit has held that Rule 7-104(A)(1) is applicable to such interrogations and, further, that it compels attorneys engaged in criminal prosecutions to refrain from contacting suspects who have retained counsel with respect to the matter then under investigation. *Hammad*, 846 F.2d at 858; *Jamil*, 707 F.2d at 646. By contrast, however, the Tenth Circuit has explicitly held that Rule 7-104(A)(1) does not apply before the commencement of adversarial proceedings. *Ryans*, 903 F.2d at 735.

Further, there is a diversity of opinion among the circuits as to the appropriate remedy to be imposed should a violation of the rule be found in a criminal case. Specifically, some circuits have held that suppression of evidence gained as the result of a violation of the rule is the appropriate remedy, *Hammad*, 846 F.2d at 860. *See also United States* v. *Killian*, 639 F.2d 206 (5th Cir.), *cert. denied*, 451 U.S. 1021 (1981); *United States* v. *Durham*, 475 F.2d 208 (7th Cir. 1973); *United States* v. *Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973), while other circuits have held that simple referral of the offending conduct to the appropriate court or agency having jurisdiction over such matters is the appropriate safeguard. *Ryans*, 903 F.2d at 740.

Rule 7-104(A)(1) of the ABA Code has been adopted with virtually no changes in New Hampshire as Rule 4.2 of the New Hampshire Rules of Professional Conduct. Petitioner, in her direct appeal to the New Hampshire Supreme Court argued that, by enlisting the aid of an unemancipated, uncounseled minor, to act as an agent for the State, to secure incriminating statements from the Petitioner after she asserted her right to counsel, the Attorney General's Office not only violated, but flouted the provisions of Rule 4.2. Petitioner asked the evidence gained as a result of the violation be suppressed.

Interestingly, New Hampshire Rule 4.2 is *identical* to Rule 4.2 of the ABA Rules. In a case involving remarkably similar facts, Chief Judge Burciaga of the United States District Court for the District of New Mexico wrote: "[t]he ban on communicating with a represented party is a fundamental principle of both state and federal law, is incorporated into federal law through the local rules, and has its roots in our common law tradition." *In Re Doe*, 801 F. Supp. 478, 485 (D.N.M. 1992) (citing *United States* v. *Thomas*, 474 F.2d 110 (10th Cir. 1973), *cert. denied*, 412 U.S. 932 (1973); *United States* v. *Hammad*, 858 F.2d 854, 837 (2d Cir. 1988); *United States* v. *Batchelor*, 484 F. Supp. 812 (E.D. Pa. 1980)). Further citing *United States* v. *Lopez*, Judge Burciaga noted: "[T]he ethical norm that an attorney should not communicate with a rep-

resented individual in the absence of that individual's attorney is long standing . . ., is widely accepted and the rule or its equivalent is now in effect in every state. The rule is designed both to protect the represented individual from overreaching opposing counsel and to ensure that the adverse party's attorney can function properly." *Doe*, 801 F. Supp. at 485 (quoting *United States* v. *Lopez*, 765 F. Supp. 1433, 1447-49 (N.D. Cal. 1991)).

The Petitioner refers this Court to Judge Burciaga's impassioned and eloquent opinion in which he describes the evolution of ethical rules governing the conduct of government attorneys involved in the prosecution of crimes.

Notwithstanding the Petitioner's clear cut assertion of her right not to be interrogated without the benefit of counsel, the New Hampshire Attorney General's Office deliberately and cavalierly trampled her rights by coercing Cecilia Pierce, an unemancipated, uncounseled minor, to become their agent for the purpose of wearing a so-called "body wire" on three occasions in an effort to secure incriminating statements from the Petitioner. (See Statement of the Case.)

Finding no precedent under New Hampshire law, and recognizing that Rule 4.2 was drawn almost verbatim from Rule 7-104(A)(1), the New Hampshire Supreme Court, not surprisingly, turned to federal law for guidance. Although the New Hampshire Supreme Court recognized the applicability of the rule to criminal, as well as civil, proceedings it nonetheless determined that, under the circumstances pertaining to Petitioner's case, there was "no ethical violation in the interception of her conversations." The New Hampshire Supreme Court reached its conclusion after a tortured attempt to portray Petitioner as not being a "party" to the investigation then under way. This ostrich-like exercise in semantics simply ignored Black's definition of a party as "a litigant, *or a person directly interested in the subject matter of a case*." (A31) (emphasis added). At the time of the secret interceptions, it is hard to imagine a person more "directly interested in the subject matter of a case" than Petitioner.

The New Hampshire Supreme Court relied heavily upon the holding in *United States* v. *Ryans*, 903 F.2d 731 (1990) to find the Attorney General's Office innocent of any ethical wrongdoing. A careful reading of the record shows the facts of the Petitioner's case bear a striking resemblance, not to those of *Ryans*, where the Tenth Circuit reversed the suppression of evidence based upon ethical violations of Rule 7-104(A)(1) by the United States Attorney, but, rather, to the facts of *United States* v. *Hammad*, 846 F.2d 854 (1988), where the Second Circuit stated suppression of evidence obtained as a result of such a violation would be the appropriate remedy.

The defendant in *Ryans*, although represented by counsel, never communicated that fact directly to the prosecuting agent, nor did he notify the prosecutor of his desire not to speak to any agents of the prosecution. By contrast, the defendant in *Hammad* notified the prosecution, through oral contact by his attorney that he was represented by counsel with respect to the matter for which he was later indicted. Under the circumstances of Petitioner's case, it was entirely reasonable that she would expect not to be interrogated by the State's alter ego, Cecilia Pierce.

As Judge Kaufman wrote in Hammad: "The Sixth Amendment and the disciplinary rule serve separate, albeit congruent purposes." *Hammad*, 846 F.2d at 859. In comparing the relationship between the Sixth Amendment of the United States Constitution and the requirements of Rule 7-104(A)(1), Judge Kaufman went on to say:

> The Constitution defines only the 'minimal historic safeguards' which defendants must receive rather than the outer bounds of those we may afford them. *McNabb* v. *United States*, 318 U.S. 332, 340 (1943). In other words, the Constitution prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise. The Model Code of Professional Responsibility, on the other hand, encompasses the attorney's duty 'to maintain

> the highest standards of ethical conduct.' Preamble, Model Code of Professional Responsibility (1981).

Hammad, 846 F.2d at 859. The Petitioner states that the determination of an appropriate remedy to impose in the event of a violation of Rule 7-104(A)(1) of the ABA Code, or its state functional equivalent, Rule 4.2, is in fact a federal question to be resolved by this Court.

Petitioner respectfully submits that this Court should, by ruling on the ethical question presented, take the opportunity to clarify the limits of proper prosecutorial behavior and, further, enunciate a clear penalty for prosecutorial conduct which falls out of bounds.

CONCLUSION

Based on the foregoing analysis, the Petitioner, Pamela Smart, respectfully requests this Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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ADDENDUM

STATUTES INVOLVED

U.S. Const. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation , and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV provides:

No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.H. R.S.A. 570A:2 (II)(d) (1991) provides:

II. It shall not be unlawful under this chapter for:

> An investigative or law enforcement officer in the ordinary course of his duties pertaining to the conducting of investigations of organized crime, offenses enumerated in this chapter, solid waste violations under RSA 149-M:10, I and I-a, or harassing or obscene telephone calls to intercept a wire or oral communication, when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception shall be made unless the attorney general, the deputy attorney general, or an assistant attorney general designated by the attorney general determines that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception. Oral authorization for the interception may be given and a written memorandum of said determination and its basis shall be made within 72 hours thereafter. The memorandum shall be kept on file in the office of the attorney general.

N.H. R.S.A. 570-A:7 (1991) provides:

The attorney, deputy attorney general, or a county attorney, upon the written approval of the attorney general or deputy attorney general, may apply to a judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, and such judge may grant in conformity with RSA 570-A:9, an order authorizing or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offenses as to which the application is made, when such interception may provide, or has provided, evidence of the commission of the offenses of homicide, . . .

N.H. R.S.A. 570-A:9 (1986) provides:

I. Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application.

American Bar Association Model Code of Professional Responsibility Disciplinary Rule 7-104(A)(1) provides:

During the course of his representation of the client, a lawyer shall not:

1. communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the

prior consent of the lawyer representing such other party or is authorized by law to do so.

American Bar Association Model Rules of Professional Conduct Rule 4.2 provides:

In representing the client, a lawyer shall not communicate about the subject of representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

N.H. Rules of Professional Conduct 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

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APPENDIX A

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the opinion goes to press.

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 91-239

THE STATE OF NEW HAMPSHIRE

v.

PAMELA SMART

February 26, 1993

John P. Arnold, attorney general (*Paul A. Maggiotto*, assistant attorney general, on the brief and orally), for the State.

Johnson, Mee & May, of Boston, Massachusetts (*J. Albert Johnson & a.* on the brief, and *Mr. Johnson* orally), for the defendant.

BATCHELDER, J. The defendant, Pamela Smart, upon entering her Derry home on the night of May 1, 1990, observed the body of her husband, apparently the victim of a homicide. The police arrived on the scene shortly thereafter and immedi-

ately commenced a murder investigation, culminating in the defendant's arrest.

After a jury trial in Superior Court (*Gray*, J.), the defendant was convicted of accomplice to first degree murder, conspiracy to commit murder, and tampering with a witness. On appeal, she raises the following issues: whether the pretrial publicity surrounding her case deprived her of an impartial jury; whether, in view of the publicity, the trial court failed to adequately safeguard the trial proceedings; whether the defendant should have been permitted post-verdict *voir dire* of the jury for alleged juror misconduct; whether the trial court erred in its supplemental instruction to the jury; whether the court erred in denying the defendant's motion to suppress tape recordings of her intercepted conversations; whether the court erred in submitting transcripts of the taped conversations to the jury; and whether the court erred in refusing to allow the defendant to recall two witnesses for renewed cross-examination. For the reasons set forth below, we affirm.

Viewing the evidence presented at trial in the light most favorable to the State, the jury was warranted in finding the facts as set forth in this opinion. In the fall of 1989, the twenty-two-year-old married defendant was the director of media services for the school district that included Winnacunnet High School in Hampton. She met and befriended William Flynn and Cecelia Pierce, two fifteen-year-old high school students from Seabrook, and they and other students worked together after school hours to produce an orange juice commercial for a contest. Eventually, in February or March of 1990, the defendant and Flynn became sexually involved.

Shortly after their affair began, the defendant told Flynn that in order for them to continue their relationship they would have to kill her husband, Gregory, a twenty-four-year-old insurance salesman to whom the defendant had been married less than a year. Eventually the defendant and Flynn together

planned that Flynn would commit the murder with the help of his friends, and would stage the killing as if committed in the course of a burglary of the defendant's home. According to the plan devised by the defendant, she would leave open the bulkhead door to the basement of her home to provide entry for Flynn and the others before Gregory returned home. The perpetrators were to park their car in a shopping center behind the residence and change into dark clothes before approaching the apartment. The defendant advised Flynn that he and his accomplices should wear gloves to avoid leaving fingerprints and should ransack the apartment, taking away whatever they wanted as compensation. Pursuant to the defendant's plan, her husband was to be killed with a gun upon entering his home as if he had surprised burglars.

Flynn discussed the plan with his friends Pete Randall and Vance Lattime, Jr., also teenagers from Seabrook. With the aid of another boy, Raymond Fowler, Flynn set out from Hampton to commit the murder one night in April, using the defendant's car. When the two arrived at the defendant's apartment complex, however, they saw her husband's truck and abandoned the plan. After this unsuccessful attempt, Flynn recruited Randall and Lattime to help execute the plan. He told them that the defendant had agreed to pay them five hundred dollars each for committing the murder. Lattime provided his father's .38 caliber revolver and his grandmother's car to transport the boys from Seabrook to the defendant's Derry apartment.

After school ended on May 1, 1990, the defendant drove Flynn, Randall and Lattime to pick up Lattime's grandmother's car in Massachusetts. The defendant discussed with them the various details of the murder plan, seeking advice on how to react when she returned home and discovered her husband murdered. Lattime and Randall returned to Seabrook in Lattime's grandmother's car. The defendant drove Flynn back to

Seabrook to meet them and then went to Winnacunnet High School to attend a meeting scheduled for that evening.

Flynn, Randall and Lattime picked up Fowler and drove to the defendant's residence. While Lattime and Fowler waited with the car at the shopping center, Flynn and Randall entered the defendant's apartment through the unlocked bulkhead into the basement. After ransacking both the upstairs and downstairs of the apartment, they waited for Gregory to return home, with Flynn carrying the gun and Randall holding a knife he had taken from the kitchen. When Gregory came home, the boys forced him to his knees. While Randall with one hand held Gregory's head down and with the other hand held a knife in front of his face, Flynn shot him once in the head. Taking a pillowcase they had filled with jewelry, the boys fled to meet Fowler and Lattime, and the four drove back to Seabrook. The next day, Lattime replaced the gun among the rest of his father's collection.

On June 10, Ralph Welch, a friend of Lattime, told Lattime's parents that Randall and Lattime had admitted to him their participation in the murder. Lattime's parents took the gun to the Seabrook Police Department, accompanied by Welch, and subsequent ballistics tests confirmed that the gun had been used in the murder.

Worried because of Welch's intentions to go to the police, Randall and Lattime went to see Flynn and the defendant at the latter's new condominium in Hampton. After discussing the matter, the defendant drove them to Seabrook in an unsuccessful attempt to retrieve the gun. The next night, June 11, Lattime, Randall and Flynn were arrested.

Virtually daily before May 1, the defendant spoke with Cecelia Pierce, her student intern, about the plan to have Flynn murder her husband. The night before the boys were arrested, the defendant told Pierce of Welch's intention to report the boys to the police, and said that if Lattime and Randall were smart they would blame Welch and Fowler for the murder.

Pierce was questioned several times about the murder by the Derry Police and denied any knowledge of it. On June 14, after hearing rumors of the impending arrest of an unidentified girl alleged to be involved, Pierce again met with the Derry police and told them of the defendant's involvement in the murder. She agreed to a phone tap of a conversation with the defendant and to wearing a recording device, or body wire, to record face-to-face conversations with the defendant. On July 12 and 13, with Pierce surreptitiously recording their conversation, the defendant warned Pierce that if Pierce told the truth to the police, Pierce would be an accessory to murder, and urged her to continue to lie. The defendant acknowledged that the boys had carried out the murder to look like a burglary as she had planned, and stated that "nothing was going wrong" until the boys told Welch about it. She stated that, if arrested, she would admit to the affair with Flynn but deny any involvement in the murder plot. She expressed concern that Lattime, who merely waited in the car during the murder, would eventually confess and implicate the others. Nevertheless, the defendant told Pierce she was confident that, as between a sixteen-year-old "in the slammer facing the rest of his life" and herself, "with a professional reputation and a course that I teach," her denial would be believed. The defendant reminded Pierce that, by telling the truth, Pierce would be sending the defendant to prison for the rest of her life.

On August 1, 1990, the defendant was arrested in connection with the murder of her husband. In January 1991, Flynn, Randall and Lattime agreed to plead guilty to reduced charges and subsequently testified for the State at the defendant's trial. Another witness, Cindy Butt, a co-worker of Pierce, testified that a month prior to the murder, Pierce told her that she had a "friend named Pam who wanted to find somebody to kill her husband." George Moses, a high school student, testified that he knew the defendant at Winnacunnet High School and

met her again while visiting his mother in prison. According to Moses, the defendant asked him to lie for her by claiming that he had overheard Pierce admit to lying to the police about the defendant's involvement.

The jury found the defendant guilty of all charges.

I. *Pretrial Publicity*

The defendant's arrest and the events leading up to her trial engendered extraordinarily heavy and widespread media coverage. Numerous articles appeared in the newspapers of the southern tier of New Hampshire, along with coverage in Lawrence and Boston, Massachusetts. By the time of the defendant's trial in March 1991, national media outlets, such as *Time* magazine, contained reports of the case. The defendant argues that this publicity was so pervasive and prejudicial that we must presume that it was impossible to select an impartial jury in Rockingham County in February 1991. She therefore contends that the trial court erred in not granting her motion for a change of venue and in not *sua sponte* ordering a continuance. Although the defendant bases her claim on both the State and Federal Constitutions, she relies primarily on federal law, and does not argue for a higher standard under the New Hampshire Constitution. Because we believe the principles are the same in any event, we address her argument under both constitutions, by reference to federal decisions. *See State* v. *Scarborough*, 124 N.H. 363, 368, 470 A.2d 909, 913 (1983).

Both the sixth amendment of the United States Constitution and part I, article 15 of the New Hampshire Constitution guarantee the right of a defendant to a trial by a fair and impartial jury. *State* v. *Vandebogart*, 136 N.H. 107, 110, 612 A.2d 906, 908 (1992). This, however, does not require that

> "the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity; and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."

Irvin v. *Dowd*, 366 U.S. 717, 722 (1961); *see also Dobbert* v. *Florida*, 432 U.S. 282, 303 (1977) ("One who is reasonably suspected of murdering [her husband] cannot expect to remain anonymous."); *State* v. *Nelson*, 103 N.H. 478, 484, 175 A.2d 814, 818 (1961) ("The very nature of the charges . . . could not fail to create general public interest with attendant widespread publicity through the various news channels."), *cert. denied*, 369 U.S. 879 *and* 369 U.S. 881 (1962).

Pretrial publicity, as we stated in *State* v. *Laaman*, 114 N.H. 794, 331 A.2d 354 (1974), *cert. denied*, 423 U.S. 854 (1975), can cause inherent prejudice or actual prejudice. "[I]nherent prejudice . . . exists when the publicity by its nature has so tainted the trial atmosphere that it will necessarily result in lack of due process." *Id.* at 798, 331 A.2d at 357. Unlike a claim of actual prejudice, "which exists when the publicity has infected the jurors to such an extent that the defendant cannot or has not received a fair and impartial jury trial," *id.*, a claim of inherent prejudice does not require the defendant to show "actual identifiable prejudice," *id.* It is inherent, or presumptive, prejudice that the defendant argues resulted from the extensive press coverage of her case, and she suggests that we ignore her jurors' professions of impartiality.

As *Laaman* indicates, inherent, or presumptive, prejudice will only be found in cases where the publicity is of a certain nature. The United States Supreme Court has held that "*adverse*

pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton* v. *Yount*, 467 U.S. 1025, 1031 (1984) (emphasis added). The Court has also held, however, that the trial court's finding that a jury was impartial should only be overturned for manifest error. *Id.* at 1031-1032.

In only one case, *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), has the Supreme Court reversed a conviction based solely on presumptive prejudice resulting from pretrial publicity without regard to the jurors' own *voir dire* testimony concerning their impartiality. There, film of the defendant's uncounseled custodial confession was broadcast three times on the local television station prior to jury selection. *Id.* at 724. Because "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality," *id.* at 726, the Court held that denial of the defendant's motion for a change of venue violated due process, *id.*, "without pausing to examine . . . the *voir dire* examinations of the members of the jury," *id.* at 727.

Other than *Rideau*, the Supreme Court has reviewed claims of presumption prejudice resulting from hostile pretrial publicity with reference to the jury *voir dire*. *See, e.g.*, *Patton* v. *Yount*, 467 U.S. 1025; *Dobbert* v. *Florida*, 432 U.S. 282; *Murphy* v. *Florida*, 421 U.S. 794 (1975); *Irvin* v. *Dowd*, 366 U.S. 717. In *Irvin*, the pretrial news accounts included the defendant's confessions to six murders, his unaccepted offer to plead guilty in exchange for a ninety-nine-year prison sentence, and numerous opinions as to his guilt. *Irvin*, 366 U.S. at 725-26. As a result of a barrage of "continued adverse publicity," *id.* at 726, the Court found prejudice notwithstanding the jurors' professed ability to be impartial. Reviewing the jury *voir dire*, the Court found that eight out of the twelve members of the defendant's jury had already formed an opinion that the defendant was guilty and acknowledged a familiarity

with the material facts of the case, "some going so far as to say that it would take evidence to overcome their belief." *Id.* at 728.

The defendant, unable to point to any identifiable, actual prejudice on the part of the jurors who decided her case, seeks to characterize the pretrial publicity surrounding her as equivalent to that in *Irvin*. She would thus have us similarly disregard the jurors' *voir dire* statements of impartiality. The first problem with her argument is seen in a comparison of the *voir dire* examinations. In *Irvin*, as noted above, two-thirds of the defendant's jury admitted to having formed an opinion about his guilt; they were seated despite the fact that the defendant, "having no more peremptory challenges, insisted [that they] should be excused for cause," *Irvin*, 366 U.S. at 724. Here, by contrast, no member of the defendant's jury expressed an opinion on *voir dire* that she was guilty. And, importantly, none sat on her jury over her objection. It is difficult to conclude in such circumstances that the trial court's finding that the jury was impartial constituted manifest error.

The second problem with the defendant's effort to equate her case with *Irvin* and *Rideau*, where the Court presumed the existence of prejudice, is in the kind of publicity involved. She refers us to the "avalanche of media attention" she received, primarily without focusing on the nature of the attention. As *Irvin* and *Rideau* make clear, however, it is the adverse nature of the publicity, not merely its quantity, that is critical in finding presumptive prejudice. *See Rideau*, 373 U.S. at 727 (community had seen and heard "not once but three times, a 'trial' of Rideau in a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute"); *Irvin*, 366 U.S. at 726 (community subjected to "continued adverse publicity").

We have carefully reviewed the massive amount of pretrial media material submitted by the defendant, comprising a sever-

al-inch-thick volume of newspaper accounts and videotaped television news stories. Several of these items, appearing immediately after the murder, were generated by the defendant herself, who granted extended interviews with the press. We agree that the publicity surrounding the defendant's case was enormous and, as claimed by some, unprecedented in this State. This "avalanche," however, is not enough. While "some of the pieces . . . are hostile in tone and accusatory in content[,] [t]he overwhelming bulk of the material submitted . . . consists of straightforward, unemotional factual accounts of events and of the progress of . . . investigations." *United States* v. *Haldeman*, 559 F.2d 31, 61 (D.C. Cir. 1976) (no presumed prejudice created by publicity about "Watergate" defendants), *cert. denied*, 431 U.S. 933 (1977). Distinguishing between straightforward factual publicity about a celebrated case and inflammatory, adverse press is crucial. "To ignore these real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent." *Murphy* v. *Florida*, 421 U.S. at 801 n.4.

The defendant points with specificity to only one item as potentially prejudicing the jury venire because of its content and proximity to jury selection. Several nights before jury selection was to begin, a local television station, WMUR-TV, aired a special program entitled "Anatomy of a Murder," devoted to the defendant's case. Consisting of footage from earlier news broadcasts that included film of pre-arrest interviews with the defendant, of her arrest and that of the teenage boys, along with commentary by a station reporter, the program also mentioned three new indictments against the defendant. One of these indictments charged her with attempting to murder a prospective witness. Suggesting a prejudicial influence on prospective jurors, the defendant points out that the evidence

of the new indictments was not introduced at trial. Exposure to inadmissible evidence, however, is not sufficient to presume jury prejudice. *Cf. Patton* v. *Yount*, 467 U.S. at 1027 (no presumption of prejudice despite press reports of defendant's written confessions, inadmissible at trial). Moreover, the *voir dire* examination of the one prospective juror who stated he had seen the program belies any claim of prejudice. The venireman was vague in his recollection of the contents of the program and was questioned in depth about it by defense counsel. At the close of his examination of the man, defense counsel did not challenge him for cause. Ultimately, it was the State that exercised a peremptory challenge to strike him from the jury.

Not only was the bulk of the publicity merely factual reporting, analysis of the material submitted by the defendant for our review indicates that most of the items appeared after the jury had been selected and had been continuously instructed by the trial court not to read or watch anything connected to the case. "Our system of justice is premised upon the belief that jurors will follow the court's instructions." *State* v. *Novosel*, 120 N.H. 176, 186, 412 A.2d 739, 746 (1980) (no abuse of discretion to refuse to poll jury regarding prejudicial publicity, where jury repeatedly admonished not to read or listen to news accounts).

The defendant has shown at most that the community from which her jury was drawn was exposed to extensive pretrial publicity that resulted in familiarity with her case. Mere familiarity, however, is not sufficient to presume prejudice. *Irvin* v. *Dowd*, 366 U.S. at 722; *State* v. *Laaman*, 114 N.H. at 800, 331 A.2d at 358. We have examined the *voir dire* of the jury and have found no evidence to support a claim of presumptive prejudice. Fifteen jurors were selected in five days, after thorough and intensive questioning by the court and counsel for both sides. Of the sixty-five prospective jurors individually

examined, one was excused for cause because of "mixed feelings" about the defendant's guilt, another was excused for cause in part due to a negative preconception based on pretrial publicity, one was excused for cause after admitting a prejudice against the defendant, and another, challenged by the defendant due to publicity, was struck by the defendant peremptorily. All of the others excused for cause were excused for reasons other than publicity, such as an inability to understand the burden of proof. After eleven prospective jurors had been questioned, the judge remarked, "I'm surprised at the number of people who have not read too many articles about this." On the third day of *voir dire*, after yet another prospective juror admitted to knowing little about the case, the judge stated, "I don't think the press is as effective as the press thinks the press is." Later the same day, in response to a juror who said the court would "probably find it hard to believe" that she knew very little about the case, the judge said, "Becoming increasingly easier to believe." One reason may be found in the responses of several prospective jurors who stated that they were preoccupied with news stories about the war: American troops were fighting in the Persian Gulf in late February 1991.

Another reason many of the prospective jurors were largely ignorant of the specifics of the defendant's case may have been the notice sent to them to report for service. The notice specifically advised the venire that they would be serving on the jury of "the *State* v. *Pamela Smart* case." The defendant argues that the notices focused the venire's attention on the medial accounts of the case. The record reveals, however, that fourteen of those individually examined stated that, upon receiving notification from the court about jury service, they deliberately avoided reading about the case, some stating that to do otherwise would not be "fair." The only prospective juror to state that he had read about the case after receiving jury notification was struck peremptorily by the State. The jury

voir dire thus demonstrates that specific reference to the defendant's case in the notice to prospective jurors was not prejudicial and may even have had a salutary effect.

The trial court and counsel for both sides conducted thorough and searching *voir dire*. When, on the afternoon of the third day, it was learned from a prospective juror that other prospective jurors were discussing the media while waiting in the jury room, the court summarily excused the remainder of the day's venire. This is evidence of the care taken by the trial court to ensure the selection of an impartial jury. *See Nelson*, 103 N.H. at 484, 175 A.2d at 819 (requiring three weeks to pick jury in widely publicized case not evidence of prejudice but rather shows court's "extreme care" in obtaining impartial jury). Moreover, the defendant's satisfaction with her jury at the time of selection may be reflected in the fact that she did not employ all of the peremptory challenges available to her, a fact relevant to a claimed lack of an impartial jury, *State* v. *Anaya*, 131 N.H. 330, 331, 553 A.2d 297, 298 (1988).

The defendant seeks to support her claim of jury prejudice with affidavits, appended to her motion for a new trial, of several potential jurors who had been discharged. According to these affidavits, certain members of the pool discussed the case on the first day they reported for jury service, expressing the opinion that the defendant was guilty. There is no evidence that any such member of the jury was selected. Additionally, the record shows that no one who sat on the defendant's jury possessed a preconceived opinion of her guilt.

We now turn specifically to the defendant's claim that the trial court should have ordered a change of venue and a continuance. The trial court denied the defendant's motion for a change of venue prior to the jury *voir dire*, ruling that the defendant could renew the motion after *voir dire*. The defendant never availed herself of this invitation. *See Johnson* v. *Nash*, 135 N.H. 534, 536, 608 A.2d 200, 201 (1992) (issue not

preserved where court granted leave to file further pleading and defendants failed to do so). We can only conclude from the defendant's failure to renew her motion, combined with her failure to make additional challenges for cause and to exhaust her peremptory challenges, that at the time of jury selection she believed she had obtained an impartial jury. Moreover, the trial judge, in his order denying the motion for a new trial, stated that his findings at the time of jury selection that the jury chosen "was absolutely and completely impartial . . . was, at the time, shared by both the defendant and [trial] counsel. There were no objections to the jury which was selected and each juror was specifically approved by counsel and the defendant individually." The defendant on appeal does not challenge this specific finding of fact by the trial court, and we find no error in the failure to change venue.

With respect to a continuance, the record indicates that one two-week continuance was requested by the defendant and granted by the trial court. According to the trial court, it "did not receive any additional motions to continue, and indeed proceeded after the short continuance on the insistence by defendant of her right to speedy trial." Although the defendant cites *United States* v. *Perez-Casillas*, 593 F.Supp. 794 (D.P.R. 1984), as support for her claim that the right to a continuance amidst pervasive publicity takes precedence over the interest in a speedy trial, she omits the significant fact that the defendants in that case affirmatively moved for a continuance until the publicity subsided. *Id.* at 796. In light of the defendant's apparent desire to proceed with her trial, our conclusion that the pretrial publicity was not so inflammatory as to preclude selection of an impartial jury, and the evidence that an impartial jury was in fact selected, we will not fault the trial court for failing to act *sua sponte* to continue the trial.

The trial court's determination of the impartiality of the jurors selected, essentially a question of demeanor and credibil-

ity, "is entitled . . . to special deference." *Patton* v. *Yount*, 467 U.S. at 1038 (quotations omitted). As the Supreme Court recently noted:

> "Particularly with respect to pretrial publicity, we think this primary reliance on the judgement of the trial court makes good sense. The judge of that court sits in the locale where the publicity is said to have had its effect, and brings to his evaluation of any such claim [of prejudice] his own perception of the depth and extent of news stories that might influence a juror."

Mu'Min v. *Virginia*, ___ U.S. ___, ___, 111 S.Ct. 1899, 1906 (1991). We hold that, notwithstanding extensive pretrial publicity, there was no manifest error in the trial court's determination that an impartial jury had been selected for the defendant's trial.

II. *Trial Atmosphere*

The defendant contends that the trial judge did not adequately safeguard the trial proceedings from what she claims was a "circus-like atmosphere" created by "media frenzy." Relying primarily on *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), where the Supreme Court reversed a conviction on a finding of presumed prejudice, she seeks to compare the *Sheppard* trial, with its "bedlam . . . and disruption," *id.* at 355, to her own. After review of *Sheppard* and of the record in this case, however, including thirty hours of videotape of the trial, this court is convinced that any comparison with *Sheppard* is illusory, and that the trial court here adequately protected the defendant's right to a fair trial. Because of the defendant's heavy reliance on *Sheppard*, we begin with an examination of that case.

The Supreme Court held in *Sheppard* that in "the totality of the circumstances," *id.* at 352, the defendant was "deprived of that judicial serenity and calm to which [he] was entitled." *Id.* at 355 (quotation omitted). These circumstances included a background of pretrial publicity described by the court as "virulent." *Id.* at 354. Headlines had "repeatedly stressed Sheppard's lack of cooperation with the police," *id.* at 338, and "disclosed that [he] had 'again . . . refused to take a lie detector test,'" *id.* at 339; television and radio broadcast a three-day coroner's inquest held in a high school gymnasium, to which Sheppard had been subpoenaed and at which his counsel were not allowed to participate, *id.* at 339; front-page editorials appeared, including one charging that Sheppard was "'getting away with murder,'" *id.*; and the names and addresses of all of the prospective jurors were published, leading to the receipt by all of them of "anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution," *id.* at 342.

At Sheppard's trial, according to the Supreme Court, "bedlam reigned . . . and newsmen took over practically the entire courtroom. . . ." *Id.* at 355. A table accommodating twenty members of the press had been set up inside the bar within a few feet of counsel table, *id.* at 355, making "confidential talk among Sheppard and his counsel almost impossible," *id.* at 344, and causing "constant commotion within the bar," *id.* at 355; virtually all of the seats in the courtroom had been assigned by the court to the press, whose "movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard," *id.* at 344; reporters clamored for access to chambers discussions between the court and counsel, "and often these matters later appeared in newspapers accessible to the jury," *id.*; and newspapers throughout the trial featured photographs of the jurors, who "were thrust

into the role of celebrities by the judge's failure to insulate them from reporters and photographers," *id.* at 353. While inflammatory newspaper articles and television and radio broadcasts appeared during the trial, containing information not introduced at trial, the judge merely made "suggestions" and "requests" to the jurors that they do not expose themselves to extrajudicial comment on the case. *Id.* at 353. Blaming the trial judge for succumbing to the press by not controlling the "carnival atmosphere at trial," and by failing "to reduce the appearance of prejudicial material and to protect the jury from outside influence," *id.* at 358, the Supreme Court concluded that Sheppard had been denied due process, *id.* at 335.

Nothing in the conduct of the defendant's trial remotely resembled these conditions, despite the media presence. From the outset, even before commencement of the jury *voir dire*, the trial judge made emphatically clear that he, and not the press, was in control of his courtroom. In his opening instructions to the panel, the judge explained that the press, including television cameras, would be present during the trial, stating:

> "The press during the trial cannot photograph jurors. The press during the trial and jury voir dire cannot mention your names, cannot interview you, cannot publish your names, and cannot photograph you at any time during the trial. But there will be cameras in here, and I'll tell you right up front as well, this is not the first time that has been done in New Hampshire where there has been press coverage and cameras in the courtroom. You'll find if there are — the jury, the final jury is among you here, that within a half an hour you pay no attention to the fact that cameras are there or that the press is in the courtroom. It's just they're there."

The trial judge specifically instructed the media regarding what it could and could not do inside and outside the courtroom. "After consultation with counsel both for the Defendant and the State," the judge assigned the media three rows of seats outside of the bar and outside of the direct view of the jury. He permitted only two video cameras in the courtroom, and instructed the press that the jurors "under no circumstances were . . . to be photographed at any time either in or out of the courtroom and were never to be approached by any media representatives." Except for one instance, when the jury was inadvertently photographed while on the view, there is no evidence that the press did not follow the court's instructions.

Although the defendant characterizes her trial as a "Roman circus" based on the conduct of the press, the only evidence to support this claim is the occasionally audible snapping of shutters of still cameras. This occurred once during Pierce's testimony and twice while the defendant testified. Each time the court admonished the photographers, and no real disruption occurred. The defendant presses a claim that "photographers would oftentimes stand in order to get their pictures . . ., . . . caus[ing] a commotion," an allegation that the trial court in its order on her motion for a new trial specifically found to be false. Her further allegation that the media, permitted to review exhibits on a table inside the bar during one recess, were free to "scrutinize notes and papers left out by defense counsel" is similarly not borne out by the record. Nothing indicates that the media came near the separate table at which defense counsel sat.

That the trial judge exerted and maintained control over the proceedings is further illustrated by his numerous and forceful instructions to the jurors not to expose themselves to any press accounts of the case. Upon selection for service, each juror was instructed individually not to read or listen to anything in connection with the case and about the importance of that

admonition. The judge also told them to report immediately to the court or sheriff any attempts made by anyone to contact them about the case. After the first day and then daily throughout the trial, the judge continually reminded the jurors that they were not to discuss the case or in any way come into contact with press accounts. The defendant complains that at the end of the first day of trial, the judge only instructed the jury not to discuss the case, omitting the admonition about media exposure. She makes no specific claim of prejudice arising from this one lapse, however, and we are convinced that on this record there was none.

Some of what the defendant contends was circus-like in the conduct of the press is alleged to have occurred outside of the courtroom, where, for example, the defendant was allegedly mobbed by photographers. The trial court, however, had kept the jury in a secured section of the courthouse away from the media, and when the jurors entered the courtroom it was through a separate, locked hallway, secured from media access. The defendant does not allege that the jury was aware of or in any way prejudiced by this spectacle.

To support her claim that the media's impact on the jury was "overwhelming," the defendant submitted an audiotape recording contemporaneously made by one of the jurors, in which the juror chronicled her daily impressions of the trial in lieu of discussing the case. Although several negative comments about the press appear in the tapes, they essentially amount to observations by the juror of the media's mere presence. Notably, when the juror spoke of the press, it was distinct from and as an aside to the essence of the tapes, which was a recapitulation of each day's testimony. The tapes make clear that the juror took her task seriously, as she recounted: "We're all listening to every single word, every wōrd, taking notes, paying attention, concentrating, and we will all through the trial"; "I, for one, have every intention of keeping an open

mind"; and, "Right now I'm still presuming her to be innocent, and I'll continue to do so all the way through until all the evidence is in." Rather than lending strength to the defendant's claim, the tapes show a thoughtful, conscientious juror determined to fulfill her obligations to be impartial and to follow the court's instructions, uninfluenced by the presence of the media.

We also take note of a comment made by the judge to the jury at the close of his final charge. As he concluded, the judge gave the standard instruction with respect to the importance of the case to the defendant, to the State and to the jury, and cautioned that the presence of the press did not make the case "any more important than any other criminal case." In the course of this instruction, he remarked parenthetically, "Because the press is here, however, and has been through this trial, and *you've been, I must say, magnificent in your ability to ignore the fact that there are many press and many people in this courtroom. . . .*" (emphasis added). Such a spontaneous observation by the trial court, who was in the best position to perceive the impact of the media on the jury throughout the three-week trial, is entitled to considerable weight upon review. *Cf. State* v. *Mills*, 136 N.H. 46, 50, 611 A.2d 1104, 1106 (1992) (great deference owed trial judge's decision on witness competency because of his "overall first-hand impressions" and "[b]ecause so much depends upon his observation of the witness") (quotations omitted); *Maguire* v. *Merrimack Mut. Ins. Co.*, 133 N.H. 51, 55, 573 A.2d 451, 454 (1990) (trial judge witnesses proceedings firsthand and "'may have insights not conveyed by the record'").

Finally with respect to the defendant's claim that her trial was conducted in a circus-like atmosphere, the court has carefully reviewed the videotapes of thirty hours of the trial, recorded by the local television station and furnished as an exhibit. They vividly demonstrate what cannot be captured from the

cold transcription of proceedings, namely, that the trial was conducted not in a carnival-like manner, but in the calm, dignified manner to which the defendant was entitled. Witnesses and counsel were plainly audible, no media representatives were inside the bar, and there was no commotion. We might add that the videotapes have given us an unusual near-firsthand glimpse of the trial judge at work. His commanding presence throughout, shown by his demeanor with counsel and with the jury, was apparent. The defendant's trial took place in a courtroom dominated not by the media but by the presiding judge.

The defendant also argues that the trial court should have granted her motion to sequester the jurors throughout the trial in order to protect them from exposure to press accounts of the trial. Sequestration is "an extreme measure, one of the most burdensome tools of the many available to assure a fair trial." *United States* v. *Porcaro*, 648 F.2d 753, 755 (1st Cir. 1981) (quotation omitted). Furthermore, the decision to grant a motion to sequester the jury is within the sound discretion of the trial court, *see State* v. *Breest*, 116 N.H. 734, 751, 367 A.2d 1320, 1333 (1976), and is not required simply because of media attention, *United States* v. *Peters*, 791 F.2d 1270, 1298 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986).

As with any claim of abuse of the trial court's discretion, the defendant must show that the court's ruling was unreasonable and prejudicial to her. We held in *State* v. *Pugliese*, 122 N.H. 1141, 455 A.2d 1018 (1982), that there was no abuse of discretion in the trial court's refusal to poll the jury regarding prejudicial newspaper articles, published during trial, where there was no evidence "that any member of the jury had read the articles and that this had resulted in deprivation of the defendant's right to a fair trial." *Id.* at 1147, 455 A.2d at 1022. We hold that a defendant challenging a trial court's denial of a motion to sequester the jury during trial must meet the same test. *See Burke* v. *State*, 484 A.2d 490, 500 (Del.

1984) (absent showing of actual prejudice, refusal of trial judge to sequester jury prior to deliberations not abuse of discretion).

Failing to point to any specific prejudicial news items observed by any juror, the defendant claims merely that "the publicity problem was obvious." We agree. The trial court handled the problem as outlined above, *i.e.*, by shielding the jury from reporters and photographers, instructing the media to keep its distance from the jury, and regularly instructing the jurors to avoid press accounts. As stated above, we will not assume that the jurors disobeyed the admonitions not to read or listen to any media accounts of the case, as "[o]ur system of justice is premised upon the belief that jurors will follow the court's instructions." *Novosel*, 120 N.H. at 186, 412 A.2d at 746. In lieu of imposing on the jury the hardship of sequestration for the more than two weeks of trial, the steps taken by the trial court were adequate.

At the conclusion of the trial, at the end of the first day's deliberations, the judge, on the defendants motion, ordered the jury sequestered for the duration of its deliberations. Defense counsel had argued that "[t]he flavor of this thing's changed a little bit with regard to the media" in that, while the media that had been present all along " seem[ed] to know the rules," there was at that time "a completely different crew out there. . . ." Although the judge ordered that sequestration would not begin until the end of the following day, the record shows that this decision was made in order to accommodate the jurors, who had not come to the courthouse prepared to be sequestered that evening. Defense counsel did not object to this procedure, and in fact had suggested to the court that it should be "very careful with regard to instituting sequestration at this point in time so that it would at least be somewhat reasonable to these folks," because defense counsel did not "know if this jury has been properly placed on notice that sequestration could have been a possibility." We conclude that

by handling the media and the jury as he did throughout the trial and by sequestering the jury when a change in circumstances appeared to warrant that action, the trial judge acted reasonably to protect the defendant's rights. Absent a specific showing that the jury had been tainted by exposure to publicity, we hold that the court did not abuse its discretion in not ordering sequestration from the outset of the trial.

III. *Alleged Juror Misconduct*

After the trial, the defendant filed a motion for individually sequestered *voir dire* of the jury on the basis of a specific allegation of misconduct by one juror. The defendant does not pursue that claim on appeal. Subsequently, she moved for a new trial on the ground of juror misconduct, and in her prayer for relief requested the trial court to "summons all deliberating jurors before the Court in order to conduct an evidentiary hearing to determine the extent and prejudicial effect of juror misconduct." In that motion the defendant alleged that the juror who had created the audiotapes of her trial recollections did so for financial gain, and that jurors were permitted to consume alcoholic beverages after deliberations while they were sequestered. On appeal, she presses her request for individual examination of the jurors only with respect to the alleged consumption of alcohol during deliberations. With respect to the juror's audiotapes, the defendant does not seek examination of the individual jurors, but rather relies upon the tapes as an independent ground for reversal.

The decision to *voir dire* or poll the jury after its verdict is within the discretion of the trial court. *State* v. *Pinardville Athletic Club*, 134 N.H. 462, 468, 594 A.2d 1284, 1288 (1991). While a trial court exercising its discretion must investigate colorable claims of improper influence on the deliberative process, it "must not allow jurors to be harassed and beset

by the defeated party in an effort to secure from them evidence of facts which might establish misconduct." *Neron* v. *Tierney*, 841 F.2d 1197, 1204 (1st Cir.) (quotations omitted), *cert. denied*, 488 U.S. 832 (1988).

The defendant's argument concerning the alleged consumption of alcohol by the sequestered jury stems from a newspaper article written by a juror after the trial, in which he stated that, at the motel after the second day's deliberations had ended, the jurors were told "that the judge had OK'd two drinks per juror, though the state wouldn't pick up the tab for alcohol." Citing *State* v. *Bullard*, 16 N.H. 139 (1844), and *Leighton* v. *Sargent*, 31 N.H. 119 (1855), which prohibit the use of alcohol by a deliberating jury, the defendant contends that the trial court's permitting the jurors to have two drinks at the motel entitled her to *voir dire* them "as to if, when and where any of them had accepted the trial court's invitation."

The trial court held a hearing on the defendant's motion for a new trial alleging juror misconduct. At the hearing, counsel for the defendant conceded that he had no evidence, "none whatsoever," that the jury had deliberated under the influence of alcohol. He admitted that the suggestion that the jurors were deliberating in their separate motel rooms on the night they were sequestered, or that they had even had alcoholic beverages that evening, was "pure speculation." Unsupported speculation does not entitle a defendant to have the trial court interrogate the jurors about alleged impropriety in deliberations. *State* v. *Donovan*, 120 N.H. 603, 607, 419 A.2d 1102, 1104-05 (1980). The trial court did not abuse its discretion in refusing to poll the jury based on the defendant's sheer conjecture.

The defendant next contends that the existence of the tape-recorded recollections of a juror is evidence of juror misconduct requiring a new trial. In her motion she alleged that the recordings had been made for the purpose of profiting from their sale after the trial. At the hearing on the motion the State

introduced affidavits, rebutting the material submitted by the defendant, supporting its claim that the recordings became the subject of possible sale only after offers by the defendant's attorneys to buy them. Defense counsel did not call the juror as a witness at the hearing, although the trial court afforded him the opportunity to do so. The evidence supports the trial court's finding that the recordings were made for the purpose stated by the juror on the tapes themselves, namely, for her own personal use. Conceding that he had no evidence that the juror formed an intent to sell the tapes at any time during her service as a juror, defense counsel argued the existence of the appearance of impropriety. On this record, however, we agree with the trial court's finding that the defendant failed to produce any evidence whatsoever of juror misconduct, and that the trial court properly denied the motion for a new trial on this ground.

IV. *Supplemental Jury Instruction*

During deliberations the jury sent out a question to the judge. After a request to clarify, the following question was then transmitted: "In your charges, Element 1 under accomplice states 'the State alleges that the defendant aided William F. in the planning or commission of the murder of Gregory Smart by taking certain actions, including . . .' Are all other actions excluded?" The trial court sent the jury the following answer: "Madame Forelady and Members, the burden is on the State to prove the elements of the charge. You may consider all the evidence before you whether the act was specifically alleged or not. The answer to your specific question is no."

The defendant objected, arguing that the State was bound by the acts alleged in the indictment. On appeal, however, she argues that the supplemental instruction was misleading, failed to dispel alleged jury confusion, and erroneously lacked

reference to the necessity for proof beyond a reasonable doubt. As none of these grounds for objecting to the instruction was raised below, they will not be considered on appeal. *State* v. *Wood*, 132 N.H. 162, 165, 562 A.2d 1312, 1314 (1989). Moreover, the only ground raised below not having been briefed, it is deemed waived. *State* v. *Field*, 132 N.H. 760, 765, 571 A.2d 1276, 1279 (1990). We note, however, that the issue waived was without merit. *See State* v. *Therrien*, 129 N.H. 765, 769, 533 A.2d 346, 348 (1987) (accomplice may be convicted on proof of acts not specified in indictment).

V. *Admissibility of Recorded Conversations*

The defendant argues that her taped conversations with Pierce, recorded pursuant to RSA 570-A:2, II(d), should have been suppressed, contending that Pierce's consent was invalid under part I, article 19 of the New Hampshire Constitution and the fourth amendment to the United States Constitution, and that the purported statutory authorization was therefore invalid; that the interceptions violated her State and federal constitutional rights to counsel; that failure to seek judicial authorization for the intercepts violated the separation of powers clause, part I, article 37, of the New Hampshire Constitution; and that the interceptions violated Rule 4.2 of the New Hampshire Rules of Professional Conduct.

In her motion to suppress the recordings, the defendant argued that the alleged invalidity of Pierce's consent made the recordings unlawful under RSA 570-A:2, II(d). Her argument on appeal that Pierce's lack of consent resulted in a violation of the defendant's article 19 and fourth amendment rights is therefore not properly preserved. *See State* v. *Wisowaty*, 133 N.H. 604, 607, 580 A.2d 1079, 1080 (1990) (issues not raised in trial court not considered on appeal).

The defendant bases her statutory claim of invalid consent on the fact that Pierce, sixteen years old at the time, was a minor and on the allegation that Pierce was coerced. The motion to suppress, however, asserted as a ground for finding lack of consent only Pierce's lack of capacity due to her minority. The State argues that any argument that Pierce was coerced is therefore not preserved. The record of the suppression hearing shows, however, that the defense tied its allegation of invalid consent to the facts surrounding this particular minor's decision to participate in the intercepts, including alleged pressure by police officers, rather than relying on a claim of *per se* incapacity due to minority. Moreover, in ruling on the motion the trial court expressly found no undue pressure on Pierce by the police. The issue is therefore properly before us.

At the hearing on the motion to suppress, Pierce testified about the events leading up to her decision to agree to the intercepts. She stated that when she lied to the Derry police during an interview on June 11, 1990, about her knowledge of the murder, Derry police Captain Jackson became angry with her. She inferred that the police knew of the defendant's involvement and that if they discovered Pierce was lying, she would be charged with "hindering an investigation." After another interview with the police on June 14, Pierce agreed to record telephone conversations with the defendant and to wear a body wire for face-to-face conversations. Pierce's mother, present at both police interviews, discussed with Pierce the advisability of participating in the intercepts prior to each one. Her signature appears with Pierce's on the consent form for the first intercept. According to Pierce, the police explained to her, before she signed the consent forms for each intercept, her right to refuse and that she "wasn't in any trouble at all." She stated that she did not consent to the intercepts out of fear of being arrested. Detective Pelletier of the Derry Police Department also testified that he witnessed her signatures on the

consent forms after explaining to her each time that the decision was hers and that she could refuse.

We conclude that the evidence supports the finding that Pierce's consent was voluntary. The trial court found, "after viewing her on the stand," that Pierce was "of sufficient maturity" to consent, and we will defer to that finding in light of the trial judge's unique vantage point in assessing the witnesses before him. *See State* v. *Mills*, 136 N.H. at 50, 611 A.2d at 1106 (because, in determining witness competency, so much depends on trial judge's observation of witness, great deference given to judge's determination). We also agree with the trial court that on this record there is nothing to suggest undue pressure by the police. Pierce acknowledged that she had originally lied to the police and that they apparently knew it. Their warnings to her that she could be prosecuted for hindering an investigation if they discovered the was not being truthful were not threats of illegitimate police action, *see United States* v. *Kolodziej*, 706 F.2d 590, 594 (5th Cir. 1983) (where threat of police action not illegitimate, consent to intercept valid) (citation omitted); "a decision to consent is not rendered involuntary merely because it is induced by a desire to avoid the possibility of a well-founded prosecution." *Com.* v. *Clark*, 533 A.2d 1376, 1379 (Pa. 1987); *cf. State* v. *Valenzuela*, 130 N.H. 175, 184, 536 A.2d 1252, 1258-59 (1987) ("What is crucial . . . is the defendant's voluntary disclosure of evidence to the agent-informer, not the agent-informer's interest or motivation when he informs the government."), *cert. denied*, 485 U.S. 1008 (1988). Pierce's consent to the intercepts was valid under the statute.

The defendant's claim that her sixth amendment right to counsel was violated by the recorded intercepts is based on the fact that, prior to the July body wire intercepts, although neither arrested nor charged with any offense, she had retained counsel and made that fact known to an assistant attorney

general. This claim is foreclosed by our decision in *State* v. *Kilgus*, 128 N.H. 577, 519 A.2d 231 (1986), where we held that the federal constitutional right to counsel was not infringed by recording the defendant's conversations prior to the institution of criminal charges. *Id.* at 593-94, 519 A.2d at 242; *see Hoffa* v. *United States*, 385 U.S. 293, 308-09 (1966).

She next argues that her part I, article 15 right to counsel had attached prior to the body wire recordings when she and her attorney notified the attorney general's office of her desire to deal with the State only through an attorney. Contending that her right to counsel under the State Constitution is greater than under the sixth amendment, she asserts in her brief that *State* v. *Tapply*, 124 N.H. 318, 470 A.2d 900 (1984), held that part I, article 15 "affords to all persons suspected of criminal activity the right to counsel." This is an exaggerated view of our holding in *Tapply*, where the defendant was subjected to custodial interrogation, attempted to invoke his right to have counsel present for questioning, and was discouraged from doing so by the police, *id.* at 324, 470 A.2d at 904. *Tapply* did not purport to announce so broad a rule as the defendant contends.

At the time of the intercepted conversations, the defendant had not been arrested and had no charges pending. We have never held that the State constitutional right to counsel, outside of custodial questioning, attaches prior to the commencement of adversarial proceedings. *See State* v. *Roberts*, 131 N.H. 512, 517, 556 A.2d 302, 305 (1989); *State* v. *Scarborough*, 124 N.H. at 370, 470 A.2d at 914 (1983). The defendant urges us to adopt the New York rule, first articulated in *People* v. *Skinner*, 52 N.Y.2d 24, 436 N.Y.S.2d 207, 417 N.E.2d 501 (1980), that once an individual is represented by counsel on the matter on which the State seeks to question her, no waiver of counsel is valid unless made in the presence of counsel. We have previously considered and rejected the reasoning

behind the strict New York rule on which the defendant relies, *see Scarborough*, *supra* at 370, 470 A.2d at 914 (expressly declining to follow *Skinner*), and we again find the argument unpersuasive. *See also State* v. *Lamb*, 125 N.H. 495, 496, 484 A.2d 1074, 1075 (1984) (reaffirming *Scarborough*'s rejection of the New York rule).

Basing her final constitutional challenge to the intercepts on the separation of powers clause, the defendant contends that the recordings were improperly authorized by the assistant attorney general because he was not a "neutral and detached magistrate." This argument is without merit. It falls as a consequence of our holding in *Kilgus*, 128 N.H. 577, 519 A.2d 231, that the fourth amendment and part I, article 19 do not apply to such consensual intercepts. *See id.* at 591-92, 519 A.2d at 240-41. Because no warrant was required, neither was the neutrality and detachment of a judicial officer.

Finally, the defendant argues that the intercepted recordings should have been suppressed because they were obtained in violation of Rule 4.2 of the New Hampshire Rules of Professional Conduct. The State counters that the rule does not apply to the investigatory stage of criminal proceedings, and that even if it were to apply, suppression is not the appropriate remedy for a violation.

Rule 4.2 of the Rules of Professional Conduct provides:

> "In representing a client, a lawyer should not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

We have not previously had occasions to decide whether the Rules of Professional Conduct bar a prosecutorial agent from

contacting a suspect whom the State knows is represented by counsel. Several federal courts have considered the issue pursuant to the nearly identical Disciplinary Rule 7-104 (A)(1) of the Code of Professional Responsibility. While there is agreement that the rule applies to criminal prosecutions as well as to civil litigation, *see United States* v. *Ryans*, 903 F.2d 731, 735 (10th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 152 (1990), the courts that have considered the question do not agree on whether the rule applies in the investigatory stage of criminal prosecutions, *id. Compare United States* v. *Hammad*, 858 F.2d 834 (2d Cir. 1988) (applying ethical rule to government's non-custodial, pre-indictment use of "sham" grand jury subpoena), *cert. denied*, ___ U.S. ___, 111 S.Ct. 192 (1990) *with United States* v. *Fitterer*, 710 F.2d 1328 (8th Cir.) (refusing to apply rule prior to indictment), *cert. denied*, 464 U.S. 852 (1983), *and United States* v. *Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973) (same), *cert. denied*, 415 U.S. 989 (1974).

We find persuasive the reasoning in *Ryans* that leads to the conclusion that the rule "was not intended to preclude undercover investigations of unindicted suspects merely because they have retained counsel," *Ryans*, 903 F.2d at 739:

> "In contrast to [N.H. Rule of Professional Responsibility 4.3, concerning a lawyer's dealings with] a 'person' who is not represented by counsel, [Rule 4.2] prohibits communications with a 'party.' Black's Law Dictionary defines party as 'a litigant, or a person directly interested in the subject matter of a case.' Moreover, the rule concerns a lawyer's conduct ['[i]n representing a client'], and is limited to communication ['about the subject matter of the representation'] with a party represented by counsel ['in the matter']. Although the [Rules] [do] not define these terms, the rule appears to contemplate an adver-

> sarial relationship between litigants, whether in a criminal or a civil setting.
>
> . . .
>
> The rule requires that the lawyer respect an adverse party's choice to be represented by skilled counsel. The rule appears to be intended 'to protect a defendant from the danger of being "tricked" into giving his case away by opposing counsel's artfully crafted questions.' [*United States* v.] *Jamil*, 707 F.2d [638,] 646 [(2d Cir. 1983)]. Logically, these concerns are implicated after the parties are in an adversarial relationship."

Id.

While we do not suggest that a prosecutor or prosecutorial agent may never be in violation of the rule prior to indictment, on the facts presented here, where the defendant was not in custody and had not been criminally charged, we find no ethical violation in the interception of her conversations.

VI. *Transcripts of Recordings of Intercepted Conversations*

The defendant argues on appeal that the trial court erred in submitting to the jury transcripts of her tape recorded conversations with Pierce, claiming that the transcripts were neither accurate nor authenticated. At trial, when the tapes were about to be played and the transcripts handed out for the jurors to read along, defense counsel expressed concern that the transcripts were "misleading" because they allegedly failed to account for the "doubling" of voices that occurs when two parties speak at once. No objection was made that the transcripts were not authenticated, and thus none is preserved for review. *See State* v. *Wisowaty*, 133 N.H. at 607, 580 A.2d at 1080.

The court overruled the defendant's objection to the use of the transcripts, and instructed the jury before the first tape was played as follows:

> "To the extent, if any exists, that the tape itself differs from what you are reading along in the transcript, you will use the tape in your consideration of the evidence in this case and not the transcript."

The court instructed the jury again, after the second tape was played, to "use what you hear and not what you read" if there was any discrepancy, and several times during its final charge the court again told the jury that the tapes must govern over any inconsistency that might appear in the transcripts.

Evidentiary rulings are within the trial court's discretion, and "[a]n appellant claiming trial court error in abusing discretion has the burden to demonstrate that the discretionary ruling is clearly untenable or unreasonable to the prejudice of his [or her] case. . . ." *State* v. *Cochran*, 132 N.H. 670, 672, 569 A.2d 756, 757 (1990). Neither at trial nor in her brief did the defendant make any particularized showing of inaccuracies in the transcripts relative to the recordings or how she may have been prejudiced thereby. The trial court's instructions to the jury adequately addressed the defendant's objection, and we find no abuse of discretion.

VII. *Re-opening Cross-examination of Prosecution Witnesses*

The defendant's final argument concerns the trial court's refusal to allow her to recall Flynn and Lattime for further cross-examination or as witnesses in her case-in-chief. She challenges the trial court's rulings as violative of her rights of confrontation under the sixth amendment and part I, article 15, her rights under the federal due process clause and part I,

article 15 to produce all proofs favorable to her, and as an abuse of discretion.

The issue arose as a result of the discovery of letters that Flynn and Lattime wrote from jail during the trial to an inmate at the New Hampshire State Prison. The letters came into the possession of the defendant's attorneys after they had completed cross-examination of the two witnesses. The defendant asked to be permitted to recall the witnesses for further cross-examination to impeach their credibility on the basis of the contents of the letters. While not claiming that the letters contained any inconsistencies with the substance of the boys' testimony, defense counsel pointed to specific items as warranting further examination. He noted that the letters contained references to the witnesses' decisions to plead guilty and testify against the defendant, to possessing photographs of the defendant, to their interest in the media attention, to Flynn's threat of violence against a prison inmate, and a profane reference to the defendant's jury.

The trial court, after reviewing the letters, denied the motion to recall the witnesses, finding nothing in the letters that could not have been inquired into on cross-examination. During her case-in-chief, the defendant moved for an order to transport Flynn and Lattime to court as witnesses for the defense. The trial court denied the motion, characterizing it as an attempt by the defense to gain by direct examination what had been denied previously, after having had a "fully utilized" opportunity for cross-examination. The court stated it had "reviewed all the letters in question and has found that none of them contain any relevant material which would be of aid to the jury. The letters contain no information which in any way contradicts the testimony of the two individuals while on the witness stand but at best show their attempts at jailhouse bravado."

A defendant's State and federal constitutional rights to confront the witnesses against her include the right to inquire on

cross-examination into a witness's motives for testifying in order to attack his credibility. *State* v. *Brown*, 132 N.H. 520, 524, 567 A.2d 544, 546 (1990); *see State* v. *Benoit*, 126 N.H. 6, 21, 490 A.2d 295, 306 (1985); *see also Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). For a trial judge to completely bar cross-examination in a proper area of inquiry violates the right of confrontation. *State* v. *Chaisson*, 123 N.H. 17, 32-33, 458 A.2d 95, 104 (1983). Once a defendant has been permitted a threshold level of inquiry, however, the constitutional standard is satisfied, and the judge's limiting of cross-examination is measured against an abuse of discretion standard. *Brown*, 132 N.H. at 524, 567 A.2d at 547.

Furthermore, once a witness has left the stand, "he cannot be recalled without the permission of the Court." *Super. Ct. R.* 69. "Our case law supports the discretion of the trial court in this matter." *State* v. *Duff*, 129 N.H. 731, 736, 532 A.2d 1382, 1384 (1987). To constitute an abuse, the court's discretion must have been exercised for reasons "clearly untenable or unreasonable to the prejudice of [the defendant's] case." *State* v. *Gooden*, 133 N.H. 674, 677, 582 A.2d 607, 609 (1990); *see Duff*, *supra* at 737, 532 A.2d at 1385 (no abuse of discretion where defense counsel had "ample opportunity to cross-examine the witness").

The record here shows that the defendant was not prohibited from cross-examining Flynn and Lattime in areas relevant to impeach their credibility through exposing their motives for testifying. Defense counsel conceded as much at trial. Although he argued that the letters contained "new information," he acknowledged, "Are there new issues that we want to talk about with these gentlemen? I think not. It goes to issues they talked about." According to the defendant, the letters imply that the boys had the opportunity to talk with each other in jail, supporting her theory that they collaborated to fabricate their testimony against her. They also show, according to the

defendant, Flynn's obsession with her and lack of remorse, and portray a colder individual than Flynn displayed on the stand. A review of the extensive cross-examination of Flynn, Lattime and Randall reveals that all of these areas had been explored. All testified that they had talked about the case and admitted that part of their motivation in cooperating with the State was out of loyalty to each other. Flynn admitted his obsession with the defendant, and also admitted that within days of the murder he participated in an unrelated burglary and committed theft. Lattime testified about laughter in the car on their way home to Seabrook after the murder and about how he and Flynn had laughed on their way to the youth detention center after being arraigned for first degree murder.

We hold that the trial judge acted within his discretion in refusing to allow the witnesses to be recalled for further cross-examination on this thoroughly trodden ground. The defendant's additional argument for the right to recall the witnesses in her case-in-chief raises no basis, distinct from the cross-examination claim, to rule otherwise. The right to produce favorable proofs under part I, article 15 does not grant the right to present cumulative testimony, *State* v. *Adams*, 133 N.H. 818, 826, 585 A.2d 853, 857 (1991), nor does the federal guarantee of due process afford such a right, *see Washington* v. *Texas*, 388 U.S. 14, 16, 23 (1967) (right to compulsory process denied when State "arbitrarily denied" right to put on stand witness "vital to the defense").

VIII. *Conclusion*

Finally, the defendant urges us to reverse on the theory that, although the errors complained of may not standing alone require reversal, their cumulative effect was sufficiently prejudicial to warrant a new trial. This argument is predicated,

however, on the existence of error in the first instance. As we have found none, the argument fails.

Affirmed.

All concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 91-239 State of N.H. v. Pamela Smart the court upon April 29, 1993 made the following order:

After consideration of all of the arguments set forth in defendant's motion for rehearing or reconsideration, including her reference to the presence of the public inside the bar enclosure during the trial, there being no showing of prejudice regarding any aspects of courtroom management by the trial judge, the motion is denied.

Distribution:
Rockingham County Superior Court (90-S-1370/71/72)
Diane M. Nicolosi, Esquire
Paul A. Maggiotto, Esquire
J. Albert Johnson, Esquire
Honorable Douglas Gray
Theresa Hayes, Supreme Court
File

Howard J. Zibel

Clerk

APPENDIX C

STATUTES INVOLVED

U.S. Const. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation , and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV provides:

No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.H. R.S.A. 570A:2 (II)(d) (1991) provides:

II. It shall not be unlawful under this chapter for:

> An investigative or law enforcement officer in the ordinary course of his duties pertaining to the conducting of investigations of organized crime, offenses enumerated in this chapter, solid waste violations under RSA 149-M:10, I and I-a, or harassing or obscene telephone calls to intercept a wire or oral communication, when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception shall be made unless the attorney general, the deputy attorney general, or an assistant attorney general designated by the attorney general determines that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception. Oral authorization for the interception may be given and a written memorandum of said determination and its basis shall be made within 72 hours thereafter. The memorandum shall be kept on file in the office of the attorney general.

N.H. R.S.A. 570-A:7 (1991) provides:

The attorney, deputy attorney general, or a county attorney, upon the written approval of the attorney general or deputy attorney general, may apply to a judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, and such judge may grant in conformity with RSA 570-A:9, an order authorizing or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offenses as to which the application is made, when such interception may provide, or has provided, evidence of the commission of the offenses of homicide, . . .

N.H. R.S.A. 570-A:9 (1986) provides:

I. Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application.

American Bar Association Model Code of Professional Responsibility Disciplinary Rule 7-104(A)(1) provides:

During the course of his representation of the client, a lawyer shall not:

1. communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the

prior consent of the lawyer representing such other party or is authorized by law to do so.

American Bar Association Model Rules of Professional Conduct Rule 4.2 provides:

In representing the client, a lawyer shall not communicate about the subject of representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

N.H. Rules of Professional Conduct 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

APPENDIX D

CHRONOLOGY OF NATIONAL HEADLINES

"Police Say Teacher Plotted To Have Student Kill Her Husband"
(*Chicago Tribune*, 8/12/90, Page 3)

"Newlywed Named In Hubby's Death"
(*San Jose Mercury News*, 8/15/90, Page 4A)

"Murder Drama Comes To Life In New Hampshire"
(*USA Today*, 8/20/90, Front Page)

"A Small Town Drama Of Life, Love and Death"
(*The New York Times*, 1/30/91, Page 16)

"Teacher's Pets Admit Murder; Was Seducing Of Students Prelude To Husband's Death?"
(*Akron Beacon Journal*, 1/31/91, Page A12)

"Murder Laced With Scandal Invades Small Eastern Town"
(*St. Paul Pioneer Press*, 2/3/91, Page 5B)

"Grieving Spouse Or Black Widow? Police Say Pamela Smart Had Her 16 Year Old Lover Murder Her Husband"
(*Time Magazine*, 2/4/91, Page 105)

"Steamy Charges Of Sex And Death Rock High School; Teacher, Three Students Tied To Killings"
(*Arizona Republic*, 2/17/91, Page A8)

"Murder For Money, Tale Of Seduction In Small Town School"
(*Houston Post*, 2/17/91, Page A19)

"Small-Town Teacher Enmeshed In Seduction-Murder Trial"
(*Orange County Register*, 2/17/91 Page A22)

"Teacher's Trial Set To Begin; Were Students Told To Kill Husband?"
(*Charlotte Observer*, 2/18/91, Page 2A)

"Trial Points Teacher As Seductress, Victim Spouse Slain In Black Widow Case"
(*Arizona Republic of Phoenix*, 3/6/91, A4)

"Teacher's Teen Lover Tried For Fatal Hit – Lurid Case Sizzles In New Hampshire"
(*San Jose Mercury News*, 3/7/91, Page 2A)

"Is She The 'Maiden Of Metal' – Or Just A Lost Little Girl"
(*Worcester Telegram and Gazette*, 3/7/91, Page 4A)

"Black Widow Accomplice Testifying At Friend's Trial"
(*Houston Post*, 3/9/91, Page A7)

"Sobbing Teen: I Killed For Love"
(*Chicago Tribune*, 3/13/91, Page 3)

"Teen Murderer Told Friend Sex With Smart Was Great"
(*Worcester Telegram and Gazette*, 3/14/91, Page A4)

"Murder Trial Rivets T.V. Viewers, The Appeal: Role Reversal, Sex and Violence"
(*Buffalo News*, 3/15/91, Page B11)

"Witness: Don't Upset Dog, Killer Told By Teacher"
(*Long Beach Press Telegraph*, 3/16/91, Page A8)

"Black Widow Trial Titillates New Hampshire"
(*San Francisco Examiner*, 3/16/91, Page A6)

"Pet's Mental Health Worried Suspect In Slaying"
(*Press of Atlantic City*, 3/16/91, Front Page)

"Witness: Teacher Told Young Lover Not To Kill Husband In Front Of Dog"
(*Press of Atlantic City*, 3/16/91, Front Page)

"Witness Says Teacher Feared Trauma To Dog"
(*Charlotte Observer*, 3/16/91, Front Page)

"Letter From A Courthouse: Murder Trial Has Sex, Money, Music and New England Town Rapt Attention"
(*Washington Post*, 3/17/91, Front Page)

"Trying Times Teacher's Murder Case Offers Hottest Tickets Around"
(*News and Sun Sentinel of Florida*, 3/17/91, Front Page)

"Keep The Blood Off The Sofa, Please"
(*Newsweek Magazine*, 3/18/91, Page 53)

"Teacher: Didn't Tell All In Mate's Slaying"
(*Atlanta Journal*, 3/19/91, Page A4)

"Teacher: I Lied About Murder"
(*Cincinnati Post*, 3/19/91, Page 2A)

"Woman Admits Affair, Denies Plot To Kill Spouse"
(*Detroit Free Press*, 3/19/91, Page 6A)

"Teacher Testifies She Did Not Ask Young Lover To Kill Spouse"
(*Los Angeles Times*, 3/20/91, Page 10

"Deadly Love Affair Has Nation Enthralled"
(*USA Today*, 3/20/91, Page 3A)

"Teens Say She's Cold And Vicious"
(*Philadelphia Daily News*, 3/20/91, Page 3)

"Dialing 900 For Murder: Boston Herald's Phone Line Lets Readers Vote"
(*Washington Post*, 3/20/91, Page B1)

"900 Line Lets Callers Judge Smart"
(*San Jose Mercury News*, 3/20/91, Page 10A)

"Prosecutor Says Teacher Shed Not A Tear Over Husband's Death"
(*Chicago Tribune*, 3/21/91, Page 10)

"Final Arguments Heard In New Hampshire Trial That Rivals Soap Opera"
(*New York Times*, 3/21/91, Front Page)

"New England's Steamy Murder Trial Goes To Jury"
(*Washington Post*, 3/21/91, Page D1)

"Prosecutor Says Teacher Showed No Grief Over Death"
(*Buffalo News*, 3/21/91, Page A3)

"Murder-Sex Melodrama Captivates New England"
(*Cincinnati Post*, 3/21/91, Front Page)

"It's Better Than Any Soap Opera"
(*Philadelphia Daily News*, 3/21/91, Page 32)

"Callers Pay To Lend Own Convictions"
(*Roanoke Times*, 3/21/91, Front Page)

"Now Here's A Unique Approach To Education"
(*Washington Times*, 3/21/91, Page 2)

CHRONOLOGY OF LOCAL HEADLINES

"Wife Made Music Video With Teen Suspect; Investigators Expect Fourth Arrest"
(*Foster's Daily Democrat*, 6/14/90, Front Page)

"Smart's Wife Knew One Of The Murder Suspects"
(*Derry News*, 6/15/90, Front Page)

"Suspects Seen At Funeral"
(*Derry News*, 6/20/90, Front Page)

"Mrs. Smart Returns To Work, Hires A Lawyer"
(*Foster's Daily Democrat*, 6/23/90, Page 3)

"Teacher Charged With Helping Student Murder Her Husband; Her Alleged Teen Lover Pulled Trigger"
(*Lawrence Eagle-Tribune*, 8/2/90, Front Page)

"Pamela Smart: A Sharp Contrast Between Yesterday And In May"
(*Manchester Union Leader*, 8/2/90, Front Page)

"Their Wedding Song Said They Would Be Always And Forever; But Forever Came Too Soon"
(*The Eagle-Tribune*, 8/2/90, Front Page)

"Murder Conspiracies Often Motivated By Love And Greed"
(*Lawrence Eagle-Tribune*, 8/3/90, Front Page)

"Love Affair With Teen Led Smart To Plan Murder"
(*Derry News*, 8/3/90, Front Page)

"Widow Pamela Smart: Mourner Or Murderees"
(*Manchester Union Leader*, 8/5/90, Front Page)

"Derry Tale Of Love And Death Leaves Questions Unanswered"
(*Manchester Union Leader*, 8/5/90, Pages 1A and 16A)

"Judge Orders Smart Held For Conspiracy In Husband's Murder"
(*The Sun* (*Lowell*), 8/7/90, Pages 1, 5, 7)

"Wife Charged In Murder Plot Is Sent Back To Jail"
(*The Eagle-Tribune*, 8/7/90, Front Page)

"Accused Wife Remains In Jail"
(*The Eagle-Tribune*, 8/7/90, Front Page)

"Judge Refuses To Free Spouse In Man's Death"
(*Boston Globe*, 8/7/90, Front Page)

"Smart Remains Jailed As Reaction Mounts"
(*Derry News*, 8/8/90, Front Page)

"Report: Money Offered In New Hampshire Murder"
(*The Sun*, 8/13/90, Pages 1 and 23)

"Report Says Payoff Promised In Smart Murder"
(*Manchester Union Leader*, 8/13/90, Front Page)

"Suspect's Own Words Keep Her In Jail"
(*The Eagle-Tribune*, 8/14/90, Pages 1 and 5)

"New Hampshire Wife Denied Bail In Slay Plot"
(*Boston Herald*, 8/14/90, Pages 1 and 16)

"Mrs. Smart Denied Bail; State: Widow Secretly Taped In Incriminating Conversation"
(*Manchester Union Leader*, 8/14/90, Front Page)

"Court Denies Smart Bail"
(*Foster's Daily Democrat*, 8/14/90, Front Page)

"Pamela Smart Indicted; Charges: Accomplice To Murder, Conspiracy, Witness Tampering"
(*Manchester Union Leader*, 8/15/90, Front Page)

"State: Smart Urged Teen To Lie To Police"
(*Derry News*, 8/15/90, Front Page)

"New Hampshire Widow's World Comes Apart As Teens Tie Her To Husband's Killing"
(*Boston Herald*, 8/19/90, Page 22)

"Smart Case Attracts Another Produce"
(*The Eagle-Tribune*, 8/20/90, Page 8)

"Smart Case Gains National Prominence"
(*Foster's Daily Democrat*, 8/23/90, Page 3)

"Videos May Surface In Smart Case"
(*Foster's Daily Democrat*, 9/7/90, Front Page)

"'Hard Copy' Titles Smart Case Show 'Scandal At School; One Girl's Secret'"
(*Manchester Union Leader*, 9/19/90, Page 3)

"Pamela Smart Trial Change Of Venue Asked Defense Motion Argues Publicity Prevents Her Getting Fair Trial In Rockingham County"
(*The Union Leader*, January 2, 1991, Front Page)

"Smart Case Lawyers Argue On Informant Deposition"
(*The Union Leader*, January 3, 1991, Front Page)

"Smart Wanted Key Witness Killed, Police Say"
(*The Eagle Tribune*, January 5, 1991, Front Page)

"Smart Indicted For Trying To Have Witness Killed"
(*The Union Leader*, January 5, 1991, Front Page)

"Indictment: Smart Tried To Put Hit On Witness"
(*The Sun*, January 8, 1991, Front Page)

"Smart Indicted On Additional Murder Plot Charges"
(*Derry News*, January 9, 1991, Front Page)

"Teen Informant May Testify At Smart Pre-Trial Hearing"
(*Foster's Daily Democrat*, January 16, 1991, Page 3)

"Smart In Court On Suppression Motion Lawyers Hope To Block 'Secret Tape'"
(*Derry News*, January 18, 1991, Page 1)

"Witness In Smart Murder Trial Has Movie Contract"
(*The Union Leader*, January 18, 1991)

"Smart's Lawyers Want Trial Moved"
(*The Sun*, January 19, 1991)

"Judge Denies Request To Move Smart Trial"
(*The Union Leader*, January 23, 1991)

"Tape Recordings To Be Allowed At Smart Trial"
(*Foster's Daily Democrat*, January 23, 1991, Front Page)

"Lawyers Base Bid To Dismiss Smart Charges"
(*Foster's Daily Democrat*, January 24, 1991, Page 3)

"Judge OK's Tapes In Smart Case"
(*The Eagle-Tribune*, January 24, 1991)

"Judge: 'Secret' Tape Admissible"
(*Derry News*, January 25, 1991, Front Page)

"Teens Plead Guilty In Smart Case"
(*Portsmouth Herald*, January 29, 1991, Front Page)

"Teenage Threesome Plead Guilty In Smart Murder"
(*The Eagle-Tribune*, January 29, 1991, Front Page)

"Teens Plead Guilty In Smart Case"
(*The Union Leader*, January 29, 1991, Front Page)

"3 New Hampshire Teens Plead Guilty To Murdering Teacher's Husband"
(*Boston Herald*, January 29, 1991, Page 14)

"Teens Plead Guilty In Smart Case"
(*Foster's Daily Democrat*, January 29, 1991, Front Page)

"Court Papers Say Teen In Murder Plot For $1,000"
(*Derry News*, February 1, 1991, Front Page)

"Could Smart Get Death Penalty"
(*The Eagle-Tribune*, February 3, 1991, Page A1)

"Smart's Lawyers Deny Deal In Works"
(*Portsmouth Herald*, February 4, 1991)

"Slay Victim's Kin Angry At Widow Suspect"
(*Boston Herald*, February 4, 191)

"Pame Smart's Attorneys To Question Seabrook Teens"
(*Foster's Daily Democrat*, February 7, 1991, Front Page)

"Judge To Caution Media Circus Won't Be Allowed"
(*Portsmouth Herald*, February 8, 1991)

"Gregory Smart's Family Awaits Trial For True Story"
(*The Eagle-Tribune*, February 8, 1991, Page 9)

"Judge Wants To Meet With Press On Coverage"
(*Foster's Daily Democrat*, February 9, 1991, Front Page)

"How Could They Have Killed? Smart Case Not Typical Of Youth's Trends Experts Say"
(*The Union Leader*, February 10, 1991, Page 8A

"Judge Gray A Key Player In Murder Trial"
(*Foster's Daily Democrat*, February 14, 1991, Front Page)

"Press Ready To Swarm On Smart Case"
(*Foster's Daily Democrat*, February 15, 1991, Page 18)

"Judge, Press Meet On Smart Trial"
(*Foster's Daily Democrat*, February 15, 1991, Front Page)

"Smart Trial Begins Tuesday, Heavy Publicity Expected"
(*The Union Leader*, February 15, 1991, Page 6)

"Media Prepare For Smart Trial"
(*The Sun*, February 15, 1991, Page 8)

"It's A Case For Hollywood, But It May Be All Too True"
(*The Sun*, February 16, 1991, Page 21)

"Eyes Of The Motion Focus On Bizarre Smart Trial"
(*Portsmouth Herald*, February 17, 1991, Front Page)

"Lawyer: Smart Case New Hampshire Is Most Publicized"
(*The Union Leader*, February 17, 1991, Front Page)

"Court Jammed By Jury Bidders"
(*Portsmouth Herald*, February 19, 1991)

"Five Jurors Chosen For 'Awesome Responsibility'"
(*Foster's Daily Democrat*, February 17, 1991, Front Page)

"Judge Denies Motion To Sequester Smart Trial Jurors"
(*Derry News*, February 22, 1991)

"Smart Trial Jury Selection Hits Snag; Judge Dismisses Seven Potential Jurors For Discussing The Case"
(*The Union Leader*, February 23, 1991, Front Page)

"Jury Selection In Smart Case Hushed"
(*Portsmouth Herald*, February 24, 1991, Page A3)

"Hollywood-like Plot Thickens For Teacher, Teens Charged In Slaying"
(*Boston Herald*, February 24, 1991)

"Parents' Grief Intensifies As Trial Nears"
(*Portsmouth Herald*, February 27, 1991, Page 6)

"Smart Jury Ready For Trial; Surprise Witness Requested"
(*Foster's Daily Democrat*, February 27, 1991, Front Page)

"Family: Victim Seems To Be Forgotten In His Murder Trial"
(*Portsmouth Herald*, February 28, 1991, Page A5)

"For Parents Of Murder Victim, First Came Shock, Then Grief And Anger"
(*The Union Leader*, February 28, 1991)

"Murder Suspect's Clothes Make A Fashion Statement"
(*The Eagle Tribune*, 3/3/91, Page B1)

"Opening Act Tuesday In Smart Trial"
(*Portsmouth Herald*, 3/3/91, Page A12)

"Jury Goes To Scene Of Murder"
(*Portsmouth Herald*, 3/4/91, Page 3)

"Smart Trial Opens With Visit To Murder Site"
(*Foster's Daily Democrat*, 3/4/91, Pages 1 and 16)

"Case Could Be A Blockbuster"
(*Boston Herald*, 3/4/91, Page 25)

"Jurors In Smart Case To Visit Murder Scene"
(*The Sun*, 3/4/91, Page 3)

"Media Descend On The County Courthouse"
(*Foster's Daily Democrat*, 3/4/91, Page 13)

"Trial Leaves Boston To Smarting"
(*Portsmouth Herald*, 3/5/91, Page 3)

"Jury Tours NH Slay Site Prior To Teacher's Trial"
(*Boston Herald*, 3/5/91)

"Courtroom Drama Opens"
(*Portsmouth Herald*, 3/5/91)

"Media Crowd Cramped Courtroom"
(*The Eagle Tribune*, 3/5/91, Front Page)

"Media Flock To Smart Trial"
(*The Eagle Tribune*, 3/5/91, Page 2)

"Smart Painted As Killer"
(*The Eagle Tribune*, 3/5/91, Front Page)

"Pamela Smart: Evil Schemer Or Innocent Victim?"
(*Foster's Daily Democrat*, 3/6/91, Front Page)

"Smart Said To Use Rock Song As Seduction"
(*The Eagle Tribune*, 3/6/91, Page 40)

"Spectators Pack Court To Watch Trial"
(*The Eagle Tribune*, 3/6/91, Page 40)

"The Murder Of Gregory Smart: 'Thrill Kill' or Plot By Pamela?"
(*The Manchester Union Leader*, 3/6/91, Front Page)

"Smart Trial Draws Unprecedented Attention"
(*Manchester Union Leader*, 3/6/91, Front Page)

"Spectators Are Spellbound By Smart Trial"
(*The Boston Globe*, 3/8/91, Pages 17 and 22)

"Witness: Pam Smart Preferred Murder To Divorce"
(*The Sun*, 3/9/91, Pages 1 and 4)

"Lattime: Murder Payment Promised"
(*Manchester Union Leader*, 3/9/91, Front Page)

"Courtroom Seats Are Prized Possessions"
(*Foster's Daily Democrat*, 3/9/91, Pages 1 and 16)

"Smart Trial Has Captive Audience"
(*Foster's Daily Democrat*, 3/9/91, Page 3)

"Smart Case Illuminates The Public's Dark Side"
(*Boston Globe*, 3/10/91, Pages 21 and 24)

"Flynn: Pam Smart Said, 'If You Love Me, You'd Do This For Me'"
(*Manchester Union Leader*, 3/12/91, Front Page)

"Murder Plot Began With Striptease And Sex"
(*The Eagle Tribune*, 3/12/91, Front Page)

"Tales Of A Seduction"
(*Boston Globe*, 3/12/91, Front Page)

"Trial Is The Hottest Ticket In Town"
(*Manchester Union Leader*, 3/13/91, Page 16)

"'Manipulative' Smart Is Guilty, Her In-Laws Say"
(*The Sun*, 3/14/91)

"Tapes: Smart Asked Teen To Lie To Cops"
(*Boston Herald*, 3/15/91, Pages 6 and 7)

"Murder Trial's Magnetic Pull On The Media"
(*Boston Herald*, 3/15/91, Page 7)

"Sordid Details Of Smart Trial Grab TV Viewers"
(*Derry News*, 3/15/91, Page 3)

"'Soap Opera' Trial Details Grab Interest"
(*Derry News*, 3/15/91, Front Page)

"Smart Trial: Sex, Lies And Audiotape"
(*The Sun*, 3/15/91, Pages 1 and 4)

"Pierce: Pam Feared Murder Might Traumatize Her Dog"
(*Manchester Union Leader*, 3/16/91, Pages 1 and 16)

"World Focuses On Smart Trial"
(*Portsmouth Herald*, 3/17/91)

"Mrs. Smart Admits Affair, Denies Murder"
(*Portsmouth Herald*, 3/18/91)

"Pamela Admits Judgment"
(*Foster's Daily Democrat*, 3/19/91, Front Page)

"Cold As Ice"
(*Boston Herald*, 3/19/91, Front Page)

"Smart Shows No Emotion In Denying Murder Plot"
(*Boston Herald*, 3/19/91, Front Page)

"You Be The Judge"
(*Boston Herald*, 3/19/91, Front Page)

"Metal Maiden Couldn't Shed A Tear"
(*Boston Herald*, 3/19/91, Front Page)

"130,000 Homes Watch Smart; Valley Viewers Agree: They Think She's Guilty"
(*The Eagle Tribune*, 3/19/91, Page 3)

"A Tangled Web Of Sex, Lies & Murder"
(*The Eagle Tribune*, 3/20/91, Pages 3 and 4)

"Readers' Verdict: Guilty As Charged"
(*Boston Herald*, 3/20/91, Page 8)

"Pam Smart's Fate Lies In Hands Of Jury As Deliberations Are Expected To Begin"
(*Boston Herald*, 3/20/91, Page 6)

"Victim's Best Friend Weighs Movie Offer"
(*Manchester Union Leader*, 3/20/91, Pages 1 and 16)

"Smart Bids For Sympathy Of Jury"
(*Boston Globe*, 3/20/91)

"Judge Denies Last-Minute Motion By The Defense"
(*Foster's Daily Democrat*, 3/20/91, Front Page)

"Court Tightens Security After Bomb Threats"
(*Foster's Daily Democrat*, 3/20/91, Page 14)

"Strains Of Heavy Metal Weave Through Trial"
(*Foster's Daily Democrat*, 3/20/91, Page 14)

"Experts: Testimony An Act Of Desperation"
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